Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

MARY ANN MCGUIRE, RUTH SCHIAVONE, AND JEAN B. ZARRELLA,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a speech-restrictive no-approach "buffer zone" law violates the First Amendment where, unlike the statute sustained in *Hill* v. *Colorado*, 530 U.S. 703 (2000), it (i) bars speech-related "approaches" only outside free-standing abortion clinics, rather than outside all health-care facilities, and thus is not content-neutral; and (ii) expressly exempts unconsented, speech-related "approaches" by clinic employees or agents, and thus is not viewpoint-neutral.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following were defendants and appellees below and are respondents in this Court:

Philip A. Rollins, District Attorney of Barnstable County, Dukes County and Nantucket County; Gerald D. Downing, District Attorney of Berkshire County; Paul F. Walsh, Jr., District Attorney of Bristol County; Kevin M. Burke, District Attorney of Essex County; Elizabeth D. Scheibel, District Attorney of Franklin County and Hampshire County; William M. Bennett, District Attorney of Hampden County; Martha Coakley, District Attorney of Middlesex County; William R. Keating, District Attorney of Norfolk County; Michael J. Sullivan, District Attorney of Plymouth County; Ralph C. Martin, II, District Attorney of Suffolk County; and John J. Conte, District Attorney of Worcester County.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Mary Ann McGuire, Ruth Schiavone, and Jean B. Zarrella respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming summary judgment (App. 1a-32a) is reported at 386 F.3d 45. The opinions of the district court at the summary judgment stage (App. 33a-43a, 45a-59a, 61a-70a) are reported at 285 F. Supp. 2d 82, 271 F. Supp. 2d 335, and 230 F. Supp. 2d 189. The opinion of the court of appeals reversing the grant of a preliminary injunction (App. 71a-99a) is reported at 260 F.3d 36. The opinion of the district court granting a preliminary injunction (App. 101a-113a) is reported at 122 F. Supp. 2d 97.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2004. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The Fourteenth Amendment to the Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 266, Section 120E½ of the Massachusetts General Laws provides:

> (a) For the purposes of this section, "reproductive health care facility" means a place, other than within a hospital, where abortions are offered or performed.
>
> (b) No person shall knowingly approach another person or occupied motor vehicle within six feet of such person or vehicle, unless such other person or occupant of the vehicle consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of 18 feet from any entrance door or driveway to a reproductive health care facility or within the area within a rectangle not greater than six feet in width created by

extending the outside boundaries of any entrance door or driveway to a reproductive health care facility at a right angle and in straight lines to the point where such lines intersect the sideline of the street in front of such entrance door or driveway. This subsection shall not apply to the following:—

(1) persons entering or leaving such facility;

(2) employees or agents of such facility acting within the scope of their employment;

(3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

(4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

(c) The provisions of subsection (b) shall only take effect during a facility's business hours and if the area contained within the radius and rectangle described in said subsection (b) is clearly marked and posted.

(d) Whoever knowingly violates this section shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 and not more than $5,000 or not more than two and one-half years in a jail or house of correction, or both such fine and imprisonment. A person who knowingly violates this section may be arrested without a warrant by a sheriff, deputy sheriff or police officer if that sheriff,

deputy sheriff, or police officer observes that person violating this section.

(e) Any person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 nor more than $5,000 or not more than two and one-half years in a jail or house of correction, or by both such fine and imprisonment. A person who knowingly violates this provision may be arrested without a warrant by a sheriff, deputy sheriff or police officer.

(f) A reproductive health care facility or a person whose rights to provide or obtain reproductive health care services have been violated or interfered with by a violation of this section or any person whose rights to express their views, assemble or pray near a reproductive health care facility have been violated or interfered with may commence a civil action for equitable relief. The civil action shall be commenced either in the superior court for the county in which the conduct complained of occurred, or in the superior court for the county in which any person or entity complained of resides or has a principal place of business.

STATEMENT

Petitioners are pro-life sidewalk counselors. They regularly station themselves on public sidewalks and streets near abortion clinics in the hope of offering women who are approaching the clinics information about, and assistance in pursuing, alternatives to having an abortion.

1. In 2000, Massachusetts adopted an abortion clinic "buffer zone" law, Mass. Gen. L. ch. 266 § 120E½ (the Act). The Act generally establishes an 18-foot zone around the entrances to any "reproductive health care facility," within which it is a crime for certain speakers to "approach" within six feet of "another person or occupied motor vehicle," during business hours and without consent, to engage in core protected speech—that is, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area." *Id.* § 120E½(b). The Act provides for criminal fines and prison terms of up to 30 months, *id.* § 120E½(d), as well as for equitable relief, *id.* § 120E½(f). Its stated goals are to "[i]ncrease the public safety in and around" abortion clinics, including "maintain[ing] the flow of traffic and prevent[ing] congestion," to "reconcile" First Amendment rights with rights of "persons seeking access to such facilities to be free from hindrance, harassment, intimidation and harm," and to "create an environment in and around [abortion clinics] which is conducive to safe and effective medical services, including surgical procedures, for patients." App. 103a.

Unlike the buffer-zone statute sustained by this Court in *Hill* v. *Colorado*, 530 U.S. 703 (2000), the Act does not apply to all health care facilities. Indeed, it does not apply to general-service hospitals at all. The Act defines a protected "reproductive health care facility" as "a place, other than within a hospital, where abortions are offered or performed." Act § 120E½(a).

Also unlike the statute at issue in *Hill*, the Act does not apply to all speakers. In addition to passersby and "municipal agents" (such as police and firefighters), the Act specifically exempts from its prohibitions all "employees or agents of [a clinic] acting within the scope of their employment," and all "persons entering or leaving" an abortion clinic. Act § 120E½(b)(1)-(2).

2. a. Petitioners sued to enjoin enforcement of the Act, arguing that the statute on its face violates their rights to

free speech, due process and equal protection under the First and Fourteenth Amendments. The district court entered a preliminary injunction. App. 101a-113a. It reasoned that limitation of the Act's coverage to abortion clinics made it content-based (App. 107a-109a), while its exemption for clinic employees and agents "clearly accords preferential treatment to expression concerning one particular viewpoint on the abortion issue, that of pro-choice" (App. 109a-110a).

b. The court of appeals reversed. App. 71a-99a (*McGuire I*). Noting an "apparently serious public safety problem" discerned by the legislature, the court concluded that the Act's "specific application" to abortion clinics was "content-neutral" because the legislature had "solid evidence" that "abortion protestors are particularly aggressive," while "patients [are] particularly vulnerable as they enter or leave" abortion clinics. App. 81a. In the court's view, the State could single out abortion clinics for speech restrictions because it was "making every effort to restrict as little speech as possible while combating the deleterious secondary effects of anti-abortion protests." App. 81a-82a.

As to viewpoint neutrality, the court of appeals criticized as "unsubstantiated" the district court's conclusion that an exemption for clinic "employees or agents," acting "within the scope of their employment," favored the pro-choice over the pro-life viewpoint. App. 83a-84a; *see also* App. 87a ("The employee exemption too is neutral on its face, drawing no distinction between different ideologies."). Rather inconsistently, however, it went on to reason that the legislature was entitled to address its actions to the source of a perceived problem; that there was "no evidence that agents and employees" caused "secondary effects" of concern to the legislature; that, indeed, the exemption was likely to "promote the Act's goals because clinic employees often assist in protecting patients and ensuring their safe passage as they approach" clinics; and that "the legislature rationally could have concluded that clinic employees are less likely to engage in directing ... *unwanted* speech toward captive listeners[.]" App. 84a (emphasis added).

The court acknowledged the "logic" of petitioners' point that, because the Act prohibits only approaches made without consent and for the purpose of engaging in speech, "the sole practical purpose of the employee exemption is to promote a particular side of the abortion debate." App. 85a. Invoking the facial nature of the challenge, however, the court placed on petitioners the burden—in a First Amendment challenge—of showing that "the exemption admits of no constitutionally permissible application," and that there was no conceivable legitimate reason for including the exemption. App. 86a. It then postulated that the legislature "[might] have exempted clinic workers—just as it exempted police officers—in order to make crystal clear what already was implicit in the Act: that those who work to secure peaceful access to [abortion clinics] need not fear prosecution." *Id.* Because it could "envision" this as "at least one legitimate reason for including the employee exemption in the Act," the court declared "it would be premature to declare the Act unconstitutional for all purposes and in all applications." App. 86a-87a.

Having held the Act both content- and viewpoint-neutral on its face, the court of appeals concluded that it was presumptively valid under the intermediate scrutiny applied in *Hill*. App. 87a-90a. It therefore vacated the preliminary injunction. App. 92a-93a. The court conceded, however, that its indulgent assumptions about viewpoint neutrality might be incorrect. It noted that "[i]f, as the plaintiffs predict, experience shows that clinic staffers in fact are utilizing the exemption as a means either of proselytizing or of engaging in preferential pro-choice advocacy, the plaintiffs remain free to challenge the Act, as applied, in a concrete factual setting." App. 87a.

3. On remand, the State moved for summary judgment. The district court concluded that the court of appeals' opinion in *McGuire I* foreclosed any holding of facial invalidity, and granted summary judgment to that extent. App. 68a n.10; *see also* App. 45a n.1. The court took note, however, of petitioners' initial showing "that abortion clinic employees or

agents have utilized the Act's exemption as a means of engaging in preferential pro-abortion advocacy within the restricted areas," and denied summary judgment on an "as applied" challenge pending further discovery. App. 67a-70a. Among other things, the evidence presented to the district court revealed that:

- Planned Parenthood, which operates a clinic outside of which petitioners counsel, had at one point instructed its "escorts" to (a) "acknowledge whatever emotions your patient is expressing as normal," (b) "[r]emind her that she owes no one an explanation about her choice of abortion," (c) counsel that "the majority of people" support legalized abortion, (d) encourage the woman to "focus on getting through to the clinic," and (e) discourage women from "talk[ing] to anyone or tak[ing] any literature." C.A. App. 908, 910.
- Clinic employees and agents regularly counseled incoming patients not to listen to petitioners or other sidewalk counselors. *See, e.g.*, C.A. App. 479-480 (escorts "pretty regularly tell them they don't have to listen to us, and don't pay attention. That type of thing."); *id.* at 497-501 (noting regular escort statements such as "You don't have to pay any attention to these people," "Stay away from them," "We'll get you in there," and "You don't have to listen to this B-I-T-C-H.").
- Clinic employees and agents regularly took pro-life leaflets away from incoming patients, sometimes as a condition of entering a clinic. *See, e.g.*, C.A. App. 498-499 ("I handed a pamphlet to a woman who was about to enter Planned Parenthood.... [An] escort, then approached within six feet of the woman, without asking for consent. And, took the pamphlet from the woman's hand, tore it up, and deposited it in the ashtray outside the Planned Parenthood door."); *id.* at 810 ("I had at one occasion, been successful in getting to a girl first, and gave her literature which she accepted. But then the escort came along, and one of the girls took it out of [her] hand and said, 'you don't need that.'"); *id.* at 626 (guard at one

clinic forced any woman entering the clinic, as a condition of entry, to discard any leaflet she had received from petitioner McGuire: "I've seen women argue with him, but if they want to go in, they have to turn [the leaflet] in."); *cf. id.* at 648 (police officer confirmed that it "happens a lot" that a pamphlet given to a woman outside a clinic is taken away from her by the person accompanying her).

- Clinic employees and agents regularly surrounded incoming patients, talked loudly or made loud noises, and spoke in favor of abortion in order to drown out pro-life speakers. *See, e.g.*, C.A. App. 543, 547 ("[E]scorts are all lined up, as they usually are, right in my face . . . some of them make fun of me—what I'm doing; some of them sing. You know, make all kinds of noise—oink or quack, or whatever, trying to drown me out."); *id.* at 831-832 ("[B]y the time I got to [a woman approaching the clinic], [clinic escorts] would have her encircled and [have begun] incessant talking. . . . [A]ll of them at one time." Most of what the escorts said was "the repeat of rhetoric. Pro-abortion rhetoric.").
- Clinic security guards were instructed to discourage prospective patients from speaking with pro-life counselors and to retrieve and destroy any pro-life leaflet that a prospective patient had accepted. C.A. App. 774-775.

The State did not dispute this evidence in seeking summary judgment, and the district court accepted it as supporting the court's previous determination "that [clinic] employees and agents had exercised their statutory right to protest, educate or counsel" from a pro-choice perspective. App. 49a n.5; *see also* App. 35a-36a. The State argued instead that the Act should be sustained, "as applied," on the basis of a non-binding statutory construction adopted by the state Attorney General after petitioners filed suit. Under that interpretation, the employee and agent exemption from the Act's limitations on protest, education, and counseling, cannot be used by exempted persons to engage in protest,

education, or counseling. Rather, the State claims that, under its interpretation, the Act "exempt[s] clinic employees and agents . . . only when they assist patients to secure safe, unimpeded clinic access, but not if they protest, educate or counsel the patients." App. 39a n.7; *see also* App. 48a-52a, 40a n.8. The district court accepted the State's argument that it had "fully adopted and [was] now applying the Attorney General's narrow, content-neutral interpretation of the employee and agent exemption requiring equal enforcement of the Act's prohibitions against all sides of the abortion debate." App. 51a-52a.

Framing the issue on remand as whether the State was "enforc[ing] the Act evenhandedly according to the Attorney General's interpretation" (App. 41a), the court concluded that petitioners had failed to raise a genuine issue of fact as to the neutrality of the State's enforcement efforts (App. 54a-55a). The court credited petitioners' evidence that "clinic employees and agents have engaged and continue to engage in 'oral protest, education or counseling' within the restricted areas." App. 38a. It accepted, however, the State's argument that petitioners could not base an "as applied" challenge on "alleged violations of the Act" (or, rather, of the Attorney General's purported construction of the Act) by clinic "escorts," because there were "no grounds upon which to attribute the actions of private escorts to the State," and therefore no "state action" to support a constitutional claim. App. 39a; *see also* App. 51a-52a, 54a-57a.

4. The court of appeals affirmed. App. 1a-32a. After reviewing the procedural history and factual record (App. 2a-16a), the court first reaffirmed its rejection of petitioners' facial challenge. As to content neutrality, the court again postulated neutral legislative purposes—"protecting safety and access to medical care"—while ignoring the fact that the Act applies only outside abortion clinics, and its restrictions therefore apply, in effect, only to abortion-related speech. *See* App. 17a-18a. As to viewpoint neutrality, the court reiterated its assertion from *McGuire I* that the Act could not be facially invalid because the court could "envision at least

one legitimate reason" for the employee exemption—"to make crystal clear . . . that those who work to secure peaceful access to [abortion clinics] need not fear prosecution." App. 18a-19a (quoting App. 86a) (first alteration in original). The court likewise rejected any facial attack based on the Act's "entry and exit" exemption. App. 19a-20a. It made clear that, in its view, the Act was "facially constitutional even without" the Attorney General's narrowing construction. App. 20a.

The court then turned to the "as-applied" framework it had suggested in *McGuire I* as appropriate for a claim "'that clinic staffers in fact are utilizing the exemption as a means either of proselytizing or of engaging in preferential pro-choice advocacy.'" App. 2a-3a (quoting App. 87a); App. 21a. At the outset, the court dismissed much of petitioners' evidence of how the Act operates in practice on the ground that it addressed "purely private action," rather than "state action." App. 22a. The court acknowledged that a challenged "statute itself can provide the requisite state action." *Id.* It sidestepped that principle, however, by noting that it had already rejected a facial challenge to the Act, and then characterizing any "acts of private parties under the statute" as "merely examples of how the statute is adversely affecting one side [of the abortion debate] more than another." App. 23a.

Having thus refused to review the constitutionality of the Act itself in light of the evidence about its application, the court of appeals concluded that "[t]he only challenge . . . left" to petitioners was "to the way the law has been enforced." *Id.* In the court's view, petitioners' "as-applied challenge must be based on the idea that the law itself is neutral and constitutional in all fact situations, but that it has been enforced selectively in a viewpoint discriminatory way." App. 25a. Thus, having deemed the state Attorney General's construction of the statute irrelevant to petitioners' facial challenge, the court in effect made such a construction dispositive of any as-applied challenge. *See, e.g.*, App. 26a ("Here, both pro-abortion and anti-abortion speech

is prohibited in the six-foot floating buffer zone, so long as there is no consent.").[1]

The court then briefly reviewed the evidence. App. 29a-32a. It dismissed evidence of clinic escorts "tell[ing] patients that they do not have to listen to [petitioners]," "tr[ying] to drown out the words of [petitioners]," and "tak[ing] anti-abortion leaflets out of the hands of patients" as not "self-evidently . . . violation[s] of the statute as interpreted by the Attorney General." App. 30a. It characterized statements by clinic agents such as "We have help. We'll help you get inside" as simply "not violations" under that interpretation. *Id.* It found "no evidence that the police turned a blind eye toward pro-abortion speech while not turning a blind eye to possible transgressions by" petitioners. *Id.* And it rejected reliance on evidence that the police had instructed clinic escorts to enter clinics with prospective patients in order to take advantage of the Act's "entry and exit" exemption, on the ground that there was "no evidence that [escorts] ha[d] proselytized as they did so." App. 31a-32a. In sum, the court rejected any as-applied challenge to the Act because it discerned "no evidence that the police have enforced th[e] statute in anything other than an evenhanded way." App. 32a.

REASONS FOR GRANTING THE PETITION

In *Hill* v. *Colorado*, 530 U.S. 703 (2000), this Court upheld a state law establishing a no-unconsented-approach buffer zone outside "any health care facility" in the State. The Court concluded that Colorado's law was "a content-neutral time, place, and manner regulation" that was adequately tailored to serve the State's purposes of ensuring unimpeded access to health care facilities and "protect[ing] those who seek medical treatment from the potential physi-

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[1] The court thought "it ma[de] no difference that the Attorney General's interpretation is non-binding for the future," because "[t]his as-applied challenge must, logically, be aimed at past conduct," so that the court could not "speculate as to future enforcement patterns." App. 30a.

cal and emotional harm suffered when an unwelcome individual delivers a message (*whatever its content*) by physically approaching . . . at close range." *See id.* at 707, 718 n.25, 719, 725-726 (emphasis added). In reaching that conclusion, the Court emphasized two aspects of the Colorado law: its application to all health care facilities, *id.* at 724-725, 728-729, 731, and its equal application to all speakers on any side of any topic, *id.* at 719-720, 723-725.

In adopting the buffer-zone law at issue here, Massachusetts purported to follow *Hill*. In fact, however, the State made two fundamentally different choices. First, it restricted speech only outside free-standing abortion clinics. Act § 120E½(a)-(b). Second, it specifically exempted unconsented, speech-related approaches by clinic "employees or agents . . . acting within the scope of their employment," by "persons entering or leaving" a clinic, and for that matter even by mere passers-by. *Id.* § 120E½(b)(1)-(2), (4). This Court should grant review to consider whether, as the court of appeals held, *Hill* authorizes the enactment of a buffer-zone law that is neither content- nor viewpoint-neutral, but rather specifically and differentially targets one side of a vigorous public debate.

I. THE ACT IS NOT CONTENT-NEUTRAL

The Act is not content-neutral because its speech restrictions are solely dependent on the presence or absence of a single, often-protested activity: abortion. Unlike the statute at issue in *Hill*—which applied broadly at all health care facilities—the Massachusetts speech restrictions apply *only* to locations "where abortions are offered or performed." Act § 120E½(a)-(b). This laser-like focus is hardly accidental: the legislature was deliberately targeting abortion protesters. App. 81a-82a (noting legislature's desire to address "deleterious" effects "of anti-abortion protests" while *otherwise* "restrict[ing] as little speech as possible").

A law may qualify for First Amendment review under the more lenient standard reserved for mere time, place or manner restrictions only if the "government regulation of

expressive activity is ... justified without reference to the content of [the] regulated speech." *Hill*, 530 U.S. at 720; *see, e.g.*, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also, e.g.*, *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) (regulation of conduct with expressive components may be subject to intermediate scrutiny where government's interest is "unrelated to the suppression of free expression"). This content-neutrality requirement is not satisfied by the mere recitation of some possible neutral legislative purpose for some applications of the law. The government's asserted interest must be implicated regardless of the content of the regulated speech. *See, e.g.*, *United States* v. *Eichman*, 496 U.S. 310, 315 (1990) (interest in preserving flag as a national symbol was implicated only when flag-burners sought to convey anti-American messages). Conversely, a court cannot rely on the neutrality of legislative purposes where a law draws operative lines that correlate with the content of the regulated speech, while leaving unregulated other speech that implicates precisely the same asserted governmental concerns. *See, e.g.*, *Hill*, 530 U.S. at 723-724. That is the situation in this case.

Hill held that a State has a legitimate interest in protecting an entire group of particularly vulnerable individuals—"those who seek medical treatment"—from unconsented, speech-related "approaches" near the entrances to medical facilities. 530 U.S. at 718 n.25; *see id.* at 715, 725. In evaluating the content-neutrality of the particular measure at issue, the Court noted that a speech-restrictive statute "lends itself to invidious use if there is a significant number of communications, raising the same problem that the statute was enacted to solve, that fall outside the statute's scope, while others fall inside." *Id.* at 723. Colorado's no-approach statute, the Court stressed, did not "distinguish among speech instances that are similarly likely to raise the legitimate concerns to which it responds." *Id.* at 724. To the contrary, the "constitutional[ly] significan[t]" point was that "all persons entering or leaving [all] health care facilities share[d] the interests served by the statute." *Id.* at 731. In assessing content-neutrality, "the comprehensiveness of the

statute [was] a virtue, not a vice, because it [was] evidence against there being a discriminatory governmental motive." *Id.* Indeed, the Court explained that it was "*precisely because* the Colorado Legislature made a *general policy choice* that the statute [was properly] assessed under the constitutional standard" for time, place and manner restrictions, rather than a stricter standard. *Id.* (emphasis added).

Massachusetts' no-approach law, unlike Colorado's, is limited to speech outside free-standing abortion clinics. The court of appeals freely acknowledged that this limited restriction "disproportionately burden[s]" those who want to speak out about abortion (and, more particularly, against it). App. 81a (*McGuire I*); *see also id.* ("[T]he Act clearly affects anti-abortion protestors more than other groups."). It held, however, that "[j]ust as targeting medical centers did not render Colorado's counterpart statute content-based, so too the Act's targeting of [only abortion clinics] fails to undermine its status as a content-neutral regulation." App. 82a (citation omitted). That position cannot be reconciled with this Court's reasoning in *Hill*.

When Massachusetts adopted its no-approach law, it articulated four ostensible statutory purposes: "[i]ncreas[ing] the public safety in and around" abortion clinics; "maintain[ing] the flow of traffic and prevent[ing] congestion around" clinics; "reconcil[ing]" First Amendment rights with "the rights of persons seeking access to such facilities to be free from hindrance, harassment, intimidation and harm"; and "creat[ing] an environment in and around [abortion clinics] which is conducive to safe and effective medical services, including surgical procedures, for patients." App. 103a n.3.

These asserted interests are similar to those recognized in *Hill*. As *Hill* itself establishes, however, these interests are the same with respect to prospective patients seeking to enter *any* health care facility. *See Hill*, 530 U.S. at 731; *see also id.* at 724, 728-729. There is no basis for distinguishing in this regard between abortion clinics and other facilities—including, for example, hospitals where abortions are performed. Without some such basis, a speech-restrictive law

purportedly justified on these grounds, but applying only to free-standing abortion clinics, is not in any realistic sense "justified without reference to the content of [the] regulated speech." *Id.* at 720. Rather, the only distinguishing factor between such approaches at abortion clinics and at other health care facilities is their likely content.

Hill recognized that differential regulation of speech about particular subject matters—regardless of viewpoint—is generally "an objectionable form of content-based regulation." 530 U.S. at 723; *see id.* at 722-723. The Court distinguished cases such as *Carey* v. *Brown*, 447 U.S. 455 (1980), and *Police Dep't of City of Chicago* v. *Mosley*, 408 U.S. 92 (1972), on the ground that Colorado's no-approach rule drew no distinction based on subject matter, but "applie[d] equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries" (*Hill*, 530 U.S. at 723), and included within its coverage all "speech instances that [were] similarly likely to raise the legitimate concerns to which it responds" (*id.* at 723-724). Those distinctions were tenable in *Hill* because the statute at issue applied to unconsented, speech-related approaches outside any health care facility. Massachusetts, however, has narrowed the focus of its regulation in a way that has nothing to do with the vulnerability of prospective patients, and everything to do with regulating speech about one particular issue—abortion.[2] Where a statute is drawn to regulate speech only in places where any speech is uniquely likely to be directed at one specific controversial topic, any sensible First Amendment

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[2] Notably, the Act specifically exempts *passers-by* from its prohibitions. Act § 120E½(b)(4). Thus, even leaving aside the exemptions for clinic employees and agents and for persons entering or leaving a clinic, the only individuals prohibited from making unconsented speech approaches in front of an abortion clinic are those who have purposefully stationed themselves there.

analysis must begin by recognizing that the law is meaningfully subject matter-specific.[3]

In *Frisby* v. *Schultz*, 487 U.S. 474, 476 (1988), the town of Brookfield received complaints about picketing outside the home of a doctor who performed abortions. In response, the town banned picketing outside all residences, to further its interest in "the protection and preservation of the home." *Id.* at 477. This Court upheld the restriction as content-neutral. *Id.* at 481. Had Brookfield instead followed the model Massachusetts used here, it would have prohibited residential picketing only outside the houses of doctors who performed abortions. It seems obvious that any such ordinance would properly have been tested under the First Amendment standards that apply to content-*based* regulations. The Massachusetts Act should have been as well.

II. THE ACT IS NOT VIEWPOINT-NEUTRAL

Even in special circumstances where a State may limit speech on the basis of *subject matter*, it may not "discriminate against speech on the basis of its *viewpoint*." *Rosenberger* v. *Rector*, 515 U.S. 819, 829 (1995) (emphasis added); *see also, e.g.*, *Mosley*, 408 U.S. at 97 (the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views"); *Carey*, 447 U.S. at 463 (same); *Denver Area Educ. Telecomms. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 799 (1996). This elementary neutrality principle "forces the government to limit all speech—including speech the government does not want to limit—if it is going to restrict any speech at all." *Rappa* v. *New Castle*

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[3] The ready availability of a content-neutral alternative—a comprehensive statute like the one upheld in *Hill*—that would serve the government's asserted interests at least as well as the enacted statute "cast[s] considerable doubt on the government's protestations that the asserted justification is in fact an accurate description of the purpose and effect of the law," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 395 (1992) (internal quotation marks omitted), and "undercut[s] significantly" any defense of the Act, *Boos* v. *Barry*, 485 U.S. 312, 329 (1988).

County, 18 F.3d 1043, 1063 (3d Cir. 1994); *see also, e.g.*, *Ackerley Communications of Mass., Inc.* v. *City of Cambridge*, 88 F.3d 33, 39 n.14 (1st Cir. 1996) ("[T]ime, place and manner restrictions are permissible in large part because they apply to all speakers.").

The *Hill* Court emphasized that Colorado's no-approach law passed this threshold test:

> [T]he relevant First Amendment point is that the statute would prevent both [pro-abortion and anti-abortion] speakers, unless welcome, from entering the 8-foot zone. The statute is not limited to those who oppose abortion.... It applies to all 'protest,' to all 'counseling,' and to all demonstrators[,] ... whether they oppose or support ... [the] abortion decision. *That is the level of neutrality that the Constitution demands.*

530 U.S. at 725 (emphasis added); *see also id.* at 719 (relying on "the State Supreme Court's unequivocal holding that the statute's 'restrictions apply equally to all demonstrators, regardless of viewpoint'"); *id.* at 731 ("As Justice Jackson observed, 'there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.'" (quoting *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (1949) (concurring opinion))); *Hill*, 530 U.S. 703 at 735 (Souter, J., concurring) (distinguishing circumstances in which government "disfavors the discussion of ... particular viewpoints within a given subject matter.").[4]

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[4] Similarly, courts of appeals considering challenges to the federal Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248, have consistently emphasized that it applies without exception to all protestors who might obstruct access to a clinic offering "reproductive health services" (including but not limited to abortions), no matter what their viewpoints. *See, e.g.*, *United States* v. *Gregg*, 226 F.3d 253, 267 (3d Cir. 2000) ("The law applies equally to all who interfere with the provision of these services, regardless of the motivation for the conduct."); *United States* v.

In stark contrast, the Massachusetts Act does not apply equally to both sides of the abortion debate. On its face, the Act specifically exempts from its general prohibition on unconsented, speech-related approaches near abortion clinics, all "employees or agents of [the clinic] acting within the scope of their employment"; all persons "entering or leaving" the clinic; and, for good measure, any person who is "using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility." Act § 120E½(b)(1)-(2), (4).[5]

This Court has recognized that "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *City of Ladue* v. *Gilleo*, 512 U.S. 43, 51 (1994) (quoting *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785-786 (1978)); *see also R.A.V.*, 505 U.S. at 392 (1992) (government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules"). Here, the first of the statutory exemptions, with its "scope of their employment" limitation, is viewpoint-based *on its face*: Any privileged speech will *necessarily* express the clinic's view.[6] The second exemption cannot plausibly be seen as viewpoint-neutral, because persons "entering or leaving" a clinic will presumably be doing so on the clinic's business, or at any rate with its permission; those seeking to

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Weslin, 156 F.3d 292, 296-297 (2d Cir. 1998) ("Thus, 'pro-choice' protestors as well as 'pro-life' protestors come within the terms of the statute.... Not only are such persons subject to prosecution in theory, but at least one pro-choice activist has, in fact, been prosecuted for violating FACE."); *United States* v. *Dinwiddie*, 76 F.3d 913, 923 (8th Cir. 1996); *American Life League, Inc.* v. *Reno*, 47 F.3d 642, 649 (4th Cir. 1995).

[5] Subsection (b)(3) exempts "law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment."

[6] The court of appeals' assertion that this exemption is "neutral on its face, drawing no distinction between different ideologies" (App. 87a) is inexplicable.

inform potential patrons of *alternatives* to the clinic's services surely will not qualify. Even the exemption permitting passers-by to engage in unconsented-to approaches, if it makes sense at all, serves principally to confirm that the only speakers the Act really targets are those who have deliberately stationed themselves outside an abortion clinic, but who are not the clinic's "employees or agents." That is a target class defined principally—and impermissibly—by its viewpoint on an issue of public concern.

This facial viewpoint discrimination by itself condemns the Act. If more were needed, however, the evidence developed in this case provides it. As outlined above (at pp. 8-9, *supra*), clinic employees and agents routinely engage in pro-clinic speech near the clinics, including encouraging patients not to listen to the petitioners and requiring that they surrender any literature they have accepted from pro-life counselors.

The court of appeals convinced itself that all this is permissible under *Hill* and this Court's other cases. Although the court's opinions took many logical turns (*see* pp. 6-7, 10-12, *supra*), in the end its reasoning may be distilled to two core points. First, the court concluded that the Act was facially valid because the court could conceive of what it thought was one potential legitimate reason for including the "employees or agents" exemption: "to make crystal clear . . . that those who work to secure peaceful access to [abortion clinics] need not fear prosecution." App. 86a. Second, the court effectively accepted the state Attorney General's purported construction that the Act prohibits "both pro-abortion and anti-abortion speech" on equal terms. *See, e.g.*, App. 26a. That approach allowed the court to ignore most of the evidence about how the Act operates in practice. *See* App. 29a-32a.

None of this is remotely satisfactory. First, when a statute impinges on First Amendment rights, a court may not simply postulate legislative aims that might support it, and require the challenger to show that a facially biased provision "admits of *no* constitutionally permissible applica-

tion." App. 86a. To the contrary, in the First Amendment context it is the *State's* burden to establish the necessity for and propriety of regulation. *See, e.g., Ashcroft* v. *ACLU*, 124 S. Ct. 2783, 2788 (2004); *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000); *Board of Trustees* v. *Fox*, 492 U.S. 469, 480 (1989); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843 (1978). Instead, the First Circuit applied what amounts to a *rational basis* test even though that doctrine has no place in First Amendment cases.[7]

Second, the sole "legitimate reason" (App. 86a-87a) the court of appeals suggested for the facially discriminatory employee exemption is *itself* viewpoint-based, and thus is not "legitimate" at all. A State may not include a special statutory exemption to make "crystal clear" that those who "work to secure peaceful access" to abortion clinics "need not fear prosecution" for their speech (App 86a) while denying the same clear protection to those who work to offer the same listener peaceful access to abortion alternatives. The government may not seek to ensure that its regulations do not "chill" one set of speakers, while leaving those with a less favored viewpoint naked to the statutory breeze. Put another way, the government does not act neutrally if it seeks to protect speakers peacefully offering access to abortion, but exposes to prosecution speakers peacefully offering access to abortion alternatives, such as adoption.

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[7] The court of appeals apparently believed that one conceivable legitimate purpose for a facially discriminatory exemption insulates it from facial attack. App. 86a-87a. That is incorrect. Where a law discriminates on its face on the basis of content or viewpoint, it is subject to strict scrutiny and presumptively invalid. Such a law has *no* permissible applications unless its terms are narrowly tailored to serve compelling governmental interests. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-643 (1994) ("But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases. . . . *Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.*" (emphasis added)).

Third, the courts below could not properly rely on the state Attorney General's present stated construction of the Act to save a statute whose plain terms are viewpoint-based. Unlike, for example, the definitive judicial construction in *Hill* (*see* 530 U.S. at 719), the Attorney General's construction has no binding force. *See Stenberg* v. *Carhart*, 530 U.S. 914, 940-941 (2000) ("[O]ur precedent warns against accepting as 'authoritative' an Attorney General's interpretation of state law when 'the Attorney General does not bind the state courts or local law enforcement authorities.'" (citing *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 395 (1988))). It is also patently inconsistent with the plain text of the statute. Even if state police and prosecutors followed it and brought parallel prosecutions, a defendant covered by one of the statutory exemptions would have a powerful, if not dispositive, defense. A defendant on the other side of the debate, prosecuted for directly comparable conduct, would have no such protection. That differential chill on protected expression arises from the face of the statute, and it cannot be remedied by any prosecutorial *ipse dixit*.

Finally, the court of appeals was wrong to discount petitioners' evidence of how this facially differential statute operates differentially in practice. The point of this evidence was never to show unfair enforcement on the part of the police. Rather, what the record confirms is that the Act works just as one would expect a facially unequal statute to work. Petitioners and other pro-life counselors are restricted from approaching potential listeners within the statutory buffer zone. At the same time, clinic "escorts," acting under the employee-or-agent and enter-or-exit exemptions, are free to engage in both their physical "escort" activities—which are themselves, of course, a powerful form of symbolic speech—and the other speech which those activities typically involve and facilitate. While petitioners should never have been required to collect evidence in order to prevail in this case, the record that has been compiled does provide a concrete factual context in which to appreciate the full force of the Act's First Amendment defects.

III. THIS COURT SHOULD GRANT REVIEW

This Court granted review in *Hill* "[b]ecause of the importance of the case." 530 U.S. at 714. In resolving the sensitive question that case presented, the Court noted the "legitimate and important concerns" on each side, including the "clear and undisputed" First Amendment interests weighing against a law that "unquestionably lessened" the ability of pro-life speakers "to communicate [their message] effectively" in "'quintessential' public forums." *Id.* at 715. The Court stressed that it was the content- and viewpoint-neutrality of Colorado's no-approach law that permitted the Court to uphold the statute under a relaxed standard of First Amendment review. *See, e.g., id.* at 719-720.

In this case, the court of appeals has taken *Hill* as a license to uphold a statute that has all the speech-restrictive vices of Colorado's, *without* the critical safeguards of general applicability and strict viewpoint-neutrality. In two opinions that contrast sharply with this Court's usual speech-protective approach, the court below strained to imagine purportedly neutral purposes for a facially discriminatory law; accepted for purposes of its review an insupportable (and non-binding) statutory construction proffered by the state authorities charged with defending an otherwise indefensible law; and on summary judgment dismissed as irrelevant the evidence amassed by petitioners to show that the statute regulates speech differentially, based on its viewpoint, not only in theory but also in practice. That is an intolerable approach to First Amendment review. Neither the Massachusetts statute nor the decisions below reflect "the level of neutrality that the Constitution demands." *Hill*, 530 U.S. at 725.

As we have explained, the court of appeals' approach cannot be reconciled with this Court's reasoning in *Hill*. The First Circuit, however, reached exactly the opposite conclusion, purporting to base its approval of Massachusetts' statute squarely on this Court's decision upholding Colorado's. *See, e.g.*, App. 89a-90a ("Because the Supreme Court concluded that the Colorado statute was narrowly tailored, the

Act too satisfies that requirement."). The principles at stake are too important to leave that misreading of this Court's First Amendment precedent unreviewed.[8] The Court should grant review to make clear that *Hill* marked an outer boundary, not an invitation to unequal government regulation of private speech in the public forum.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[8] In the alternative, if the court of appeals is correct that *Hill* requires upholding the statute at issue here, then petitioners respectfully submit that *Hill* itself is now demonstrably unsound, and should be reconsidered. *See, e.g.*, Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 Harv. C.R.-C.L. L. Rev. 31, 31 (2003) (*Hill* has been "condemned by progressive and conservative legal scholars alike"); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 Pepp. L. Rev. 723, 734-738 (2001) (critiquing *Hill*'s First Amendment analysis); Colloquium, *Professor Michael W. McConnell's Response*, 28 Pepp. L. Rev. 747, 750 (2001) (quoting Laurence Tribe's description of *Hill* as "slam-dunk simple and slam-dunk wrong"); *id.* at 747-750 (quoting Prof. McConnell's critique of *Hill*); Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 Am. U.L. Rev. 179, 182 (2001) ("Disturbingly, the Court made it substantially easier for government entities to discriminate against disfavored viewpoints in the public forum provided that their enactments maintain the thinnest facade of neutrality.").

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

MARY ANNE MCGUIRE, et al.,

Plaintiffs, Appellants,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, et al.,

Defendants, Appellees.

No. 03-2389

Heard Sept. 8, 2004
Decided Oct. 12, 2004

[386 F.3d 45]

Before BOUDIN, Chief Judge, LYNCH, Circuit Judge, SCHWARZER,* Senior District Judge.

LYNCH, Circuit Judge.

This appeal is the second appearance here of a case challenging a state law regulating speech and activities within a buffer zone around health care facilities which perform abortions. Three plaintiffs, women who are regular pro-life "sidewalk counselors," appeal from an entry of summary judgment against their First Amendment attacks, both facial and as-applied, on the Massachusetts statute. We address whether the prior opinion of this court precludes plaintiffs' facial attack, the effect of several exemptions under the

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* Of the Northern District of California, sitting by designation.

statute as interpreted by the Attorney General, and the showing needed to make out an as-applied attack.

The Massachusetts legislature, concerned about a history of violence outside abortion clinics and the harassment and intimidation of women attempting to use such facilities, enacted in 2000 the Massachusetts Reproductive Health Care Facilities Act, Mass. Gen. Laws ch. 266, § 120E1/2. The Act creates a fixed buffer zone within an 18-foot radius around the facilities (Reproductive Health Care Facilities or "RHCFs"). The Act creates a floating six-foot buffer zone around any person in that 18-foot area. Within that six-foot floating buffer zone, it is impermissible for a person to "knowingly approach another person . . ." without consent "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling." *Id.* The Act was largely modeled on the Colorado law found constitutional in *Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000), although there are some differences.

Mary McGuire, Ruth Schiavone, and Jean Zarella brought suit in U.S. District Court after the Act became effective to preliminarily enjoin enforcement of the statute as unconstitutional, both facially and as-applied, under the First Amendment. Their success at the district court level in obtaining a preliminary injunction, *McGuire v. Reilly*, 122 F. Supp. 2d 97 (D. Mass. 2000), was short-lived.

In *McGuire v. Reilly*, 260 F.3d 36 (1st Cir. 2001) (*McGuire I*), this court reversed the grant of the preliminary injunction, holding that plaintiffs had shown no probability of success on their claim that the statute was facially unconstitutional and had not produced evidence to demonstrate **[*49]** any unconstitutionality on an as-applied basis. This court also recognized that plaintiffs, should they adduce sufficient facts, might be able to make out a claim that the statute, as applied, was unconstitutional:

> If, as the plaintiffs predict, experience shows that clinic staffers in fact are utilizing the exemption as a means either of proselytizing or of engaging in

> preferential pro-choice advocacy, the plaintiffs remain free to challenge the Act, as applied, in a concrete factual setting.

McGuire I, 260 F.3d at 47. *McGuire I* found the plaintiffs had not to date produced any evidence that clinic employees or agents had in fact engaged in the sort of speech proscribed by the statute, and thus could not even begin to make an as-applied attack.

The case was remanded. Plaintiffs pursued claims of both facial and as-applied unconstitutionality. Defendants were granted summary judgment on the plaintiffs' claim of facial unconstitutionality based on *McGuire I*. *McGuire v. Reilly*, 230 F. Supp. 2d 189, 193 n.10 (D. Mass. 2002). After ample time for discovery, the defendants moved for summary judgment on the as-applied challenge. Plaintiffs opposed on grounds there were at least genuine disputes of material fact entitling them to trial. The district court granted summary judgment on the as-applied claim. *McGuire v. Reilly*, 271 F. Supp. 2d 335, 345 (D. Mass. 2003).

Plaintiffs appeal from the judgment embodying both grants of summary judgment: on the facial claim and on the as-applied claim.

I.

We recount the evidence submitted on summary judgment, resolving all factual disputes in plaintiffs' favor.

The Act's requirements are triggered only within two areas defined as fixed buffer zones. The first type of fixed zone is a semicircle including all space within a radius of 18 feet from any entrance, door, or driveway to a reproductive health care facility. *See* Mass. Gen. Laws ch. 266, § 120E1/2(b). It is marked by painted lines. The second type of fixed zone is a rectangle or corridor extending from the two outside boundaries of any entrance door or driveway to a reproductive health care facility out to the street in front of that door or driveway. *Id.* The width of this rectangle is thus the distance between the two sides of the door or driveway, capped at a maximum of six feet, while the length

is the distance between the door or driveway and the street. This second type of fixed zone apparently is not redundant with the first type only where the length between the door or driveway and the street exceeds roughly 18 feet. Anyone can enter these two types of fixed buffer zones. However, within the fixed buffer zones, the law creates a six-foot "floating" buffer zone around persons or occupied motor vehicles: it bans approaches into this floating zone, without the consent of the person approached, for purposes of oral protest, education, or counseling. *Id.* The Act contains several exemptions from its coverage: most relevant here, it exempts "employees or agents" of an RHCF who are "acting within the scope of their employment," Mass. Gen. Laws ch. 266, § 120E1/2(b)(2), and it exempts "persons entering or leaving" an RHCF, Mass. Gen. Laws ch. 266, § 120E1/2(b)(1).

The challenged statute permits speech or conduct within the six-foot zone so long as it is consented to by the person approached (we will use the term "patient"). It also places no restrictions in speech or conduct outside of the six-foot zone.

[*50] The facts of this case involve two abortion clinics, one in Boston and one in Brookline. On Saturday mornings only, Planned Parenthood League of Massachusetts ("PPLM") utilizes patient escorts in front of and near its Boston facility. These escorts are volunteers; PPLM has, nonetheless, established their duties and responsibilities and has engaged in training and supervision of the escorts. The Boston escorts wear blue vests and are easily identifiable. By contrast, the Repro Associates clinic in Brookline, Massachusetts, uses a more informal system of volunteers to provide escort services on the days when abortions are performed.

The plaintiffs Mary Anne McGuire, Ruth Schiavone, and Jean Zarella regularly sidewalk counsel at the Boston PPLM clinic and/or at the second facility, Repro Associates in Brookline. They attempt to dissuade women from having abortions by engaging in conversation, passing out leaflets,

and offering their assistance. None of the plaintiffs has ever been arrested for violation of the Act; some have been warned or threatened with arrest for their actions in front of the facilities.

McGuire

McGuire goes to the Boston PPLM clinic every Thursday morning (in the past, she went on Wednesday mornings) and occasionally other mornings and had been doing so for more than four years as of 2002. She also protests at the Brookline Repro clinic when others regularly scheduled to be there are not there. One of McGuire's jobs since she has been working at Operation Rescue (a pro-life protest group) has been to coordinate the persons who do such sidewalk counseling. McGuire arranges to have sidewalk counselors at the facilities on all days abortions are performed: Tuesday through Saturday at PPLM in Boston; Monday, Tuesday, Friday, and Saturday at Repro in Brookline.

McGuire tries to engage with patients coming toward the entrance as far away from the clinic as she can, in order to maximize the opportunity to engage in conversation. Most of the time when she approaches women she is well outside the 18-foot protected area. When McGuire approaches women outside of the fixed buffer zone she tries to get very close to the women. She also approaches women within the fixed buffer zone and tries to stay at least six feet away. There are women who become upset when she approaches.

McGuire has had several encounters with the police which are not related to the buffer zone statute, such as when she was asked to remove a stool and a television from the sidewalk and asked to place signs elsewhere. Many of McGuire's encounters with the police have been friendly, as when the police say hello to her. McGuire testified that she was threatened with arrest once in 2002 at the Boston PPLM clinic due to the buffer zone statute. An officer threatened to arrest her if she did not "stay outside the white line" (the 18-foot fixed buffer zone, marked with

paint). However, no criminal complaint was taken out. McGuire did not express her disagreement to the Boston Police Department.

McGuire testified that escorts sometimes tell patients that they do not need to listen to her. She stated that one guard inside the Brookline Repro clinic made women turn in any pro-life leaflets before they could enter, even after women have argued with him. An employee of the firm that manages the medical practice at the Brookline facility could not speak directly to the truth of this allegation but has seen patients hand pamphlets to security people **[*51]** to throw them out as they are entering the building.

Schiavone

Schiavone, who protests on Saturdays at the Boston PPLM clinic, testified at deposition that she too tries to encounter patients as far outside the fixed buffer zone area as she can. Even so, at times she cannot get near the patient because the clinic escorts are already with the patient. She also enters the fixed, 18-foot protected area. Schiavone has sometimes been able to counsel a woman from some distance away from the door all the way up to the door, although she remains 6 feet away once the 18-foot protected area is reached.

On three separate occasions, two different police officers and a police captain spoke to Schiavone and told her that she was violating law. On all three occasions, a patient had just entered the facility and Schiavone was trying to maintain a "presence" by continuing to look at or speak to the patient through the PPLM facility's glass doors. On the first occasion, Schiavone was within the 18-foot protected area but probably three feet from the PPLM private property line; on the second and third occasions, she was also within the protected area and was very close to the PPLM property line. In the first and third cases, unknown officers stated that they thought Schiavone was violating the buffer zone law; in the second case, it is unclear whether the police captain thought Schiavone was violating the buffer zone law or fal-

ling afoul of preexisting trespass laws because she was over the property line. Schiavone told the officers involved in the first two incidents that she was not in violation of the law. Neither officer pursued the issue; both merely walked away. The officers involved in the first two incidents told Schiavone that she was violating law; the officer in the third, most recent case told Schiavone she was violating the law and also asked her how she would "like to be arrested." No criminal complaint was taken out in any of the three cases. Schiavone has had three encounters with the police captain involved in the second incident and has found him to be respectful, approachable and not hostile.

In one incident observed by Schiavone, when a pro-life sidewalk counselor was knocked down by a stranger who had come along and told him to mind his own business, the police arrested the man who committed the assault. Schiavone also testified that the police cannot see everything that goes on in front of the facilities, and usually when a policeman approaches her it is because a facility escort has seen her activity, gone over to the police and pointed it out.

Schiavone also testified that escorts sometimes will tell patients things like "You don't have to listen to her [Schiavone]. Don't pay any attention to her," and patients will then sometimes tell her to go away. But she did not report these statements either to PPLM or to the police. She also testified that she has seen escorts take leaflets that she has given to patients and their companions out of these people's hands; on a couple of occasions, an escort took a leaflet from a patient's hands without asking for consent and tore it up. Sometimes the patients are accompanied by companions, such as boyfriends, who will sometimes, in various forms, tell Schiavone to go away. When the escorts escort a woman into the clinic, Schiavone has no knowledge about whether the woman had spoken with PPLM (to request escorts) before coming to the clinic that day or whether the woman had consented to the escorts' approach.

Zarella

Zarella engages in sidewalk counseling most often on Fridays at the Brookline [*52] Repro facility, although she protested at the PPLM facility once. She, too, tries to reach patients who she thinks are going in for an abortion as far away from the doorway as possible. When she approaches women, some of them stop but those who stop, stop only briefly. Zarella has never been threatened with arrest by the police. Zarella testified that her activities take place almost entirely outside the white line that designates the buffer zone.

Zarella testified that sometimes companions of patients become upset with her and tell her to go away. She stated that escorts often try to surround patients and chatter loudly to drown her out, or have told patients not to listen to Zarella. Sometimes escorts have repeated "[p]ro-abortion rhetoric," such as "We have help. We'll help you get inside." Further, Zarella testified that in May 2002, a man accompanying a patient walked into her and made threatening statements, the police responded to complaints about him, and she filed a criminal complaint against him. Zarella has never complained to the police about anything the escorts were doing.

Enforcement Policy

Even before this court's *McGuire I* opinion in August of 2001, the state Attorney General's office provided advice by letter dated November 10, 2000, to local police departments in Brookline and Boston. The letter set forth the Attorney General's interpretation of the language of the Act providing that the exemption for clinic employees and agents applied only when such persons were "acting within the scope of their employment." This interpretation has remained essentially consistent from the beginning.[1] In this first letter, the

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[1] Thus, the February 14, 2003 letter from an assistant attorney general to various police personnel across the state did not signify a new interpretation; it was merely a restatement of an old position. In this most

Attorney General noted that if escorts were to approach within six feet of a woman within the fixed buffer zone in order to "hurl[ ] epithets at demonstrators," then their actions would not be within the scope of their employment and they would not be protected by the exemption.

On July 16, 2001, the Attorney General's office provided training to the same effect to the Boston Police Department. The training noted that the exemption for clinic employees was for the purpose of permitting employees and agents to help patients into clinics. On July 25, 2001, the same training was provided to the Brookline Police Department. In turn, the Boston Police Department adopted the view that if escorts act outside of the bounds of their employment as so defined, then the clinic escorts, if engaged in prohibited speech or conduct, would be violating the law.

Before this court's decision in *McGuire I*, representatives of the Attorney General's office met with representatives of PPLM on May 23, 2001, to communicate the Attorney General's interpretation that the Act's exemption for clinic employees and agents acting within the scope of their employment would not protect such persons if they were to use the exemption to engage in counter-protests, counter-education, or counter-counseling against anti-abortion views, rather than simply assisting the patients into the clinic and protecting clinic access. And once this court issued its decision in *McGuire I*, the Attorney General's office, on December 19, 2001, sent a copy of the opinion to PPLM, reiterated its view of the exemption, and directed PPLM to the language in the First Circuit opinion that the purpose of the clinic employee and agent exemption **[*53]** was in order to permit patients to "'secure peaceful access' to clinics." On the same date, the Attorney General similarly informed the Brookline facility.

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recent clarification of the interpretation, the Attorney General has clearly construed the exemption to exclude pro-abortion or partisan speech from the term "scope of their employment."

The policies of the Boston Police Department on the Act are consistent as to both sides of the abortion debate. The Department policy is to be flexible, to warn individuals first and to try to mediate any dispute, before taking enforcement actions. Warnings have been given by the Boston Police to both pro-life protestors and clinic escorts. The pro-life protestors have received warnings when they have gotten too close to people walking into the Boston clinic and/or have gotten in their way. In turn, clinic escorts have been warned about putting out their arms to fend off pro-life protestors and about being overly aggressive in getting patients into the building. The Boston Police view the term "scope of employment" as permitting escorts to escort patients into the clinic and to offer them assistance. In its view, the Act prohibits escorts from approaching patients within the buffer zone without consent to counsel, leaflet or educate them.[2] One anti-abortion sidewalk counselor, Cheryl Fitzpatrick, was arrested on February, 15, 2002, for repeatedly violating the buffer zone law even after being warned. There was one arrest of a Marie Vitale for stalking.

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[2] By affidavit, a Boston Police Department captain confirmed that the Department followed the interpretation set forth by the Attorney General and that the Department enforced the law first by warnings, then by mediation attempts before making any arrests:

> Both pro-life protestors and clinic escorts have received warnings from Boston Police officers. Pro-life protestors have received warnings when they have come within extremely close proximity of people walking into the Planned Parenthood facility and have gotten in their way. Planned Parenthood escorts have received warnings about putting out their arms to fend off pro-life protestors and about being overly aggressive in getting patients into the building....
>
> To my knowledge, there has been only one person arrested for violating the buffer zone law at the Planned Parenthood facility in Boston. The person arrested is a pro-life "sidewalk counselor" (but not one of the plaintiffs in this case) who was arrested after repeated warnings over a period of months from me or my officers.

The Brookline Police Department has a similarly flexible policy of first warning the person engaged in the conduct, then video-and-audio taping the conduct. Arrests are only made if the conduct persists. The Brookline Police also take the position that because the escorts at the Brookline clinic are neither employed nor supervised by the clinic, those individuals do not get the benefit of the clinic exemption. People expressing both anti-abortion and pro-abortion views in front of clinics have received warnings from the Brookline Police. The officer in charge of enforcement of the law at the Repro facility has warned people about 12 times. In his years of observing incidents at the Repro clinic both before and after the enactment of the buffer zone law, this officer had seen roughly 25 incidents of violence. There have been no arrests for violations of the buffer zone law in Brookline.

The police testified that there are certain inherent difficulties in enforcement of the law from the point of view of the police. For example, the police usually do not know whether a patient entering the clinic has consented or not consented to an approach. Also, the Boston police captain tries to survey the whole scene and thus is usually not close enough to hear what the sidewalk protestors are actually saying to the patients.

Other Evidence of Activities

Shortly after the effective date of the Act, in November 2000, a Boston police **[*54]** captain reported to an assistant attorney general that plaintiff Schiavone had approached a patient within feet of the buffer zone at the PPLM clinic and told the patient not to "kill her baby." She was given a warning by the police. In early January 2001, unidentified demonstrators approached within six feet and harassed the employees and agents of the Boston PPLM clinic within the buffer zone. In February 2001, a number of abortion protestors impeded access to the Boston PPLM clinic. In March 2001, PPLM complained to the police that two sidewalk counselors were approaching occupied cars without consent within the 18-foot fixed buffer zone area. In April 2001 at

the Boston clinic, anti-abortion protestors reportedly prevented a patient from getting out of her car.

The Security Director for the Brookline Repro clinic has called the Brookline Police about anti-abortion protestors. The director has generally called the police only when protestors have actually stood on both sides of the front door pushing literature and holding signs in the faces of patients entering the clinic, with the patients telling the protestors to leave them alone. The protestors, he testified, refused to stay six feet away as required by the buffer zone law but instead argued with those trying to enter the clinic and told them that they "[didn't] have to murder [their] child." The Security Director thought that when confronted with those types of facts, the Brookline Police might do something "as far as warning [the protestors] to move back a few feet at that point." The Security Director testified that he had not had much success in getting the Brookline Police to act.

The individual plaintiffs have never complained to the police about clinic employees or escorts, although one individual, William Cotter, who shares their anti-abortion opinion and has acted as the head of Operation Rescue, has complained to the Boston Police when he believed clinic employees or escorts were violating the buffer zone law. Cotter stated that escorts sometimes tell patients things to the effect that they do not need to listen to the pro-life protestors. He also stated that escorts sometimes "ask[ ]" or "suggest[ ]" that patients give them any anti-abortion leaflets they have received from protestors. For example, they say things like: "Do you want me to take that from you," or "You know, you don't need that."

Finally, an employee of PPLM and the chief escort both testified that at some point, a Boston police captain asked that escorts walk patients into the vestibule of the clinic in the course of their escorting duties. The police captain at issue denied ever "instruct[ing] the escorts or representatives" of PPLM "to accompany the person entering the clinic right into the clinic," and further denied that this was ever an "issue with [him]." At least one set of PPLM's instruc-

tions to its volunteer escorts included the instruction that "[w]hen you bring patients to the door of the clinic you should walk into the vestibule with them and then turn around and come back out. The reasons for this (if there are any) are complex. However, the police want the escorts to walk into the building."

II.

Plaintiffs initially attacked the buffer zone law facially; they were granted a preliminary injunction against its enforcement, with the district court holding that the Act was not content neutral because it applied only to abortion clinics and seemed targeted only at the topic of abortion speech. *McGuire v. Reilly*, 122 F. Supp. 2d 97, 102 (D. Mass. 2000). The court also held that the law was viewpoint discriminatory because the statutory exemption for clinic **[*55]** employees and agents showed on its face that pro-abortion speech was being favored over pro- life speech. *Id.* at 103-04.

In *McGuire I*, this court reversed the grant of the preliminary injunction, and in the process we essentially struck down plaintiffs' facial challenge. *McGuire v. Reilly*, 260 F.3d 36 (1st Cir. 2001). The *McGuire I* court held that plaintiffs had shown no probability of success on the merits. The buffer zone law, it held, should be classified on its face as a content-neutral time, place, and manner restriction and thus should be upheld against a facial challenge because it satisfied intermediate scrutiny. *Id.* at 48.

We noted in *McGuire I* that the Massachusetts buffer zone statute was very similar to the buffer zone statute that had been upheld as a content-neutral time, place, and manner restriction in *Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000). The key inquiry in both cases, the *McGuire I* court noted, was the statute's purpose: specifically, whether the legislative purpose was one that was "unrelated to disagreement with the underlying message of particular speech, and advances interests unconnected to expressive content." *McGuire I*, 260 F.3d at 44

(citing *Hill*, 530 U.S. at 719, 120 S. Ct. 2480). After looking at the statute and its legislative history, the court in *McGuire I* found that the legislative purposes of the enactment, as was the case with the statute in *Hill* were content-neutral ones designed to promote personal security and to facilitate safe access to medical care. *Id.*

Turning to the exemption for clinic employees, we considered in *McGuire I* that it perhaps could be enforced in a viewpoint discriminatory manner but that plaintiffs' facial challenge necessarily failed, given that there was at least one content-neutral purpose for the exemption (and thus it could be enforced in a content-neutral manner). *Id.* at 46-47. One content-neutral purpose was the reinforcement of the idea that "those who work to secure peaceful access to RHCFs need not fear prosecution." *Id.* at 47. The court then added the following: "If, as the plaintiffs predict, experience shows that clinic staffers in fact are utilizing the exemption as a means either of proselytizing or of engaging in preferential pro-choice advocacy, the plaintiffs remain free to challenge the Act, as applied, in a concrete factual setting." *Id.* The court thus set out the initial, threshold showing that plaintiffs would need to make before they could even begin building an as-applied challenge.

On remand, the district court recognized that the facial challenge had been foreclosed by *McGuire I* and granted summary judgment against the plaintiffs on their facial claim. *McGuire v. Reilly*, 230 F. Supp. 2d 189, 193 n.10 (D. Mass. 2002). However, the court provided a discovery period to develop a factual record on the as-applied claim; only after an additional discovery period of six months did it grant summary judgment against plaintiffs on the as-applied claim as well. *McGuire v. Reilly*, 271 F. Supp. 2d 335 (D. Mass. 2003).

The district court gave the Attorney General's interpretation of the Act "great weight" and noted that it was in harmony with the content-neutral legislative purposes outlined in our decision in *McGuire I*. *Id.* at 342. The court stressed that the Attorney General's interpretation had

been adopted by the Brookline and Boston Police Departments. *Id.* at 340.

The court then stated that in order to mount an as-applied challenge, the plaintiffs needed to show "a pattern of unlawful favoritism, abuse, or infelicitous application" involving the conduct of state actors. *Id.* at 342. The court noted the plaintiffs' evidence of alleged violations of the buffer zone law and pro-abortion advocacy by [*56] escorts, but also found that "the plaintiffs' evidence focuses almost exclusively on the conduct of clinic escorts, rather than on the conduct of law enforcement." *Id.* Plaintiffs failed to raise a genuine issue of fact that the police departments were not applying the law in an evenhanded manner and in accordance with the Attorney General's content-neutral interpretation. *See id.* at 343. Since the escorts were merely private actors, and since there was no evidence that state actors were not being evenhanded, the as-applied claim foundered on the lack of state action. *See id.* at 342-43.

Plaintiffs then moved at the district court level to alter or amend the judgment, arguing that the law was not being evenhandedly enforced by the enforcement authorities. *McGuire v. Reilly*, 285 F. Supp. 2d 82 (D. Mass. 2003). From the evidence described earlier, they argued that escorts continued to engage in pro-abortion oral protest, education, and counseling, yet no police officer was in a position to enforce the law against escorts because the police stood too far away, no escort had ever been warned, arrested, or prosecuted by the police for speech prohibited by the Act (although they had been warned for physical aggressiveness), and police officers had instructed escorts to enter and exit the building with the patients they are escorting, thus circumventing the Attorney General's limited interpretation of the employee and agent clause in the statute. *Id.* at 86-87.

The district court rejected these arguments, noting that few arrests had been made on either side given the police's flexible enforcement policy, and that the police decisions as to where best to position themselves deserved some deference. *Id.* at 87-88. The court determined that warnings of

escorts for physical aggressiveness did help to show that the statute was being evenhandedly enforced, because warnings for physical aggressiveness helped to serve the purposes behind the buffer zone act—the warnings removed obstacles to anti-abortion protestors' ability to get consent to approach patients. *Id.* The court finally noted that the "enter and exit" exemption should not be interpreted to apply to the escorts because they were covered by a separate exemption, and the allegations made that the police were using this exemption to circumvent the Attorney General's interpretation failed to give the reasons the police might have had for giving escorts such an instruction. *Id.* at 88. Thus, the court concluded that there was still no genuine issue of material fact that the statute was being enforced in a non-evenhanded manner, and denied the motion to alter or amend the judgment. *Id.* at 89.

After judgment issued, the plaintiffs timely appealed the grants of summary judgment on both the facial claim and the as-applied claim.

III.

Since the matters were resolved on summary judgment, we review de novo the district court's conclusion that there were no *genuine* issues of material fact. *Joyal v. Hasbro, Inc.*, 380 F.3d 14, 16, 18 (1st Cir. 2004).

A. *Facial Attack*

Plaintiffs continue their attack on the facial validity of the statute in this second round. They point out that the decision in *McGuire I* addressed only preliminary injunctive relief; they argue *McGuire I* held no more than that they lacked a probability of success on the merits. Plaintiffs' attempt to use the limits of preliminary injunctive relief here misunderstands both *McGuire I* and the nature of a facial attack.

[*57] Plaintiffs argue that the Act on its face embodies impermissible content-based regulation of such and, alternatively, that it constitutes viewpoint discrimination. In their

facial attack, the burden on the plaintiffs is normally expressed as a showing that the statute "admits of no valid application." *McGuire I*, 260 F.3d at 47. One articulation of the requirements of a federal court facial challenge, unless claims of overbreadth (and possibly also vagueness) are at issue, is set forth in *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987):

> A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.

Id. at 745, 107 S. Ct. 2095; *see also City of Chicago v. Morales*, 527 U.S. 41, 55 & n.22, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (noting, in plurality opinion, that the standard for evaluating facial challenges is not necessarily quite as demanding as indicated by *Salerno*, at least where vagueness concerns are present: a law is sometimes subject to facial attack where "vagueness permeates the text"); Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1321-23 (2000) (explaining the split on the Supreme Court over whether the *Salerno* formulation of facial challenges is correct or whether some slightly less demanding standard is appropriate).

The nature of plaintiffs' facial attack on both the content and viewpoint theories turns not on the historical facts of how the statute has been applied, but on the words of the statute. Both the content and viewpoint theories focus on the Act's exemption for "employees or agents of [an RHCF] acting within the scope of their employment." Mass. Gen. Laws ch. 266, § 120E1/2(b)(2). Plaintiffs argue that the statute is content-based because the application of this exemption necessarily requires reference to the content of speech: one cannot determine whether an agent of the clinic is violating the Act without seeing whether she has moved outside the scope of her employment by protesting, educating, and counseling.

This argument is foreclosed to plaintiffs as a pure matter of law under *Hill*, 530 U.S. at 719-22, 120 S. Ct. 2480, as explained in *McGuire I*, 260 F.3d at 44. Here, the statute—based on the very limited scope of behavior affected—is a simple time, place, or manner restriction. In such a case, the core inquiry for determining content neutrality is not whether applying the statute requires some reference to the content of speech, but whether the legislative reason for the law is content neutral. Just like the Colorado statute in *Hill*, 530 U.S. at 719-20, 120 S. Ct. 2480, the statute here has content-neutral purposes: protecting safety and access to medical care. *McGuire I*, 260 F.3d at 44. The mere fact that the police might, in some instances, need to listen to the content of speech to determine if the law has been violated does not make the statute content based. *See Hill*, 530 U.S. at 720-22, 120 S. Ct. 2480.

Similarly, the facts plaintiffs have presented, based on the new record assembled since remand from *McGuire I*, which they claim prove that the statute in practice has a tendency to burden pro-life speech more than it burdens pro-choice speech, are irrelevant to the statute's content (or viewpoint) neutrality. As we noted in *McGuire I*, this statute is content neutral if it was enacted for a content-neutral legislative purpose, regardless of any "incidental[ ] ... adverse effect on certain messages while leaving others untouched." *McGuire I*, 260 F.3d at 43. [*58] The plaintiffs have done nothing to undermine our earlier finding of a content-neutral legislative purpose.

Plaintiffs' facial challenge of impermissible viewpoint discrimination is also based on the law's exemption for "employees or agents." As we explained in *McGuire I*, so long as a reviewing court can "envision at least one legitimate reason for including the employee exemption in the Act," the law is not facially unconstitutional. *McGuire I*, 260 F.3d at 47. In *McGuire I* this court found there were likely explanations for the exemption other than the desire to favor pro-abortion speech over anti-abortion speech: "For example, the legislature may have exempted clinic workers—just as it

exempted police officers—in order to make crystal clear . . . that those who work to secure peaceful access to RHCFs need not fear prosecution." *Id.* at 47. For this reason given in *McGuire I*, the viewpoint facial attack fails, now as then.[3]

We turn to one last argument that plaintiffs urge as to facial constitutionality. They argue that *McGuire I* was wrong in holding that the various statutory exemptions did not render the statute facially unconstitutional because of facts which developed after *McGuire I* was decided. They argue that the Attorney General's interpretation of the "employees or agents" exemption, so as to place pro-choice advocacy by escorts outside of the exemption's safe harbor, is a plainly incorrect interpretation of the language of the exemption and at any rate is not binding. Moreover, they argue that this interpretation has set up a new ground for facial unconstitutionality. Plaintiffs point to some evidence, noted above, showing that a Boston police captain perhaps at some point after this interpretation was issued suggested that escorts should enter the building with the patients that they have been escorting. From this the plaintiffs deduce that the statute's exemption for "persons entering or leaving [RHCFs]" is facially unconstitutional; the purpose for this exemption, plaintiffs submit, is to protect the pro-abortion counseling and education of escorts and others that would not otherwise be allowed under the statute.

The argument turns back on itself and fails. The Supreme Court has held that "[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered." *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)) (al-

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[3] Had there been an intervening change in controlling Supreme Court case law between *McGuire I* and now, plaintiffs could have plausibly argued for a different outcome. There has been no such change and their argument is foreclosed.

terations in original) (internal quotation marks omitted). The usual idea, though, is that the limiting construction put on the Act by its interpretation can save a statute that would otherwise be facially unconstitutional. Logically, there is no way (save perhaps when overbreadth is an issue) that an authority's non-binding and non-authoritative[4] interpretation of a facially valid statute can make it more facially constitutionally vulnerable than it would be otherwise. Here the statute is facially constitutional even without the limitation; the disputes over the correctness of the Attorney General's interpretation **[*59]** over the binding nature of this interpretation, and over the police department's alleged instruction to the RHCFs are irrelevant to this facial challenge. We discuss later the role these interpretations play in the as-applied challenge.

To the extent that plaintiffs are arguing that the entry and exit exemption is itself facially unconstitutional, they are wrong. Like the employee and agent exemption looked at in *McGuire I*, the entry and exit exemption has many "likely" legislative motivations that are content neutral. *See McGuire I*, 260 F.3d at 47. For example, as the district court noted below, the exemption seems likely to have been intended merely to emphasize that "persons with legitimate business inside the clinic, such as patients" and companions accompanying patients with their consent, are protected from the Act's restrictions. *McGuire*, 285 F. Supp. 2d at 88. This is fully consistent with the Act's content-neutral aim of securing safe medical access.

Plaintiffs have offered no reason why the conclusion reached in *McGuire I* that the statute is facially constitutional is flawed. We affirm entry of summary judgment on that claim.

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[4] Since plaintiffs argue that the Attorney General's interpretation is neither binding nor authoritative, they cannot simultaneously make a *facial* attack on the law based on that interpretation.

B. As-Applied Attack

Plaintiffs mount two types of challenges to the entry of judgment against their as-applied claim.

First, they argue that the district court applied the wrong standard to evaluate their claim. They say their burden was to show no more than that clinic employees or others were approaching within six feet of people in the 18-foot protected area, without getting the consent of the people approached. They say no showing of "state action" is necessary. Further, they argue that the district court wrongly held them to the more stringent standards of an equal protection selective prosecution claim, rather than to those of an as-applied First Amendment viewpoint discrimination claim.

Second, the plaintiffs argue that the district court erred in concluding that their evidentiary submissions raised no genuine dispute of material fact. We address this argument later.

Three preliminary items may be quickly dispatched. First, the defendants argue that absent some concrete injury to plaintiffs, such as being arrested, the as-applied challenge is neither ripe nor do the plaintiffs have standing. Plaintiffs alleged that they have been chilled in the exercise of their speech rights by fear of arrest and some have been threatened with arrest. Like the district court, we have no doubt plaintiffs have standing under the First Amendment doctrine for equitable relief, and the controversy is ripe. *See Steffel v. Thompson*, 415 U.S. 452, 475, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974) (declaratory relief available on as-applied challenge when no state prosecution is pending); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 56-60 (1st Cir. 2003) (the First Amendment challenge of a newspaper reporter to a criminal libel statute was ripe, and the reporter had standing, where the law chilled the reporter's writing as there was no indication that the state had disavowed criminal prosecutions of violators).

Second, the plaintiffs simply misread *McGuire I* when they argue that it held that all plaintiffs need to show to win an as-applied challenge is that clinic employees engaged in

nonconsensual pro-abortion advocacy within the six-foot floating buffer zone. *McGuire I* described some evidence which was a necessary but not sufficient predicate for any as-applied claim.

Third, the plaintiff argue that activities of private persons, including **[*60]** those neither known to the police nor to which the police have turned a blind eye, demonstrate that the statute has been applied in a viewpoint discriminatory way. Not so. Obviously, only the government can violate First Amendment rights: every First Amendment claim thus requires state action in some sense. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001) (state action is a necessary component of a constitutional claim against a state); *Hudgens v. NLRB*, 424 U.S. 507, 514-21, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976) (First Amendment claim required state action; claim against private shopping center for preventing peaceful labor picketing failed because shopping center was not a state actor); *Yeo v. Town of Lexington*, 131 F.3d 241, 248, 255 (1st Cir. 1997) (en banc) (state action is necessary component of First Amendment claim; student editors exercising independent editorial judgment were not state actors). Yet much of what plaintiffs complain about here is purely private action jousting with the ideas plaintiffs espouse. The First Amendment is concerned with government interference, not private jousting in the speech marketplace.

Sometimes, as plaintiffs state, the statute itself can provide the requisite state action, at least if there is some threat that the statute will be enforced by state personnel. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941-42, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) ("While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action," and acts done under the authority of that statute can be considered state action if the acts are done jointly by private and state actors). However, as the court noted in *Lugar*, it all depends

on what is being challenged: state action is present in this way only if what the plaintiff is really aiming at is the constitutionality of the statute itself. For example, there is no state action if what the plaintiff is really aiming at are the acts of private persons that are actually illegal under the statutory scheme, because then the acts do not reflect the policy of the state. *See id.* at 940-41, 102 S. Ct. 2744. To the extent that the plaintiffs are claiming that the statute is unconstitutional as applied merely because private pro-choice persons are engaging in acts that are illegal under the statute, their claim has nothing to do with the statute at all and they cannot bring it because there is no state action.

Here, plaintiffs claim to be aiming at the statute itself: they argue that the fact that private pro-choice individuals are now engaging in various acts that they claim are allowed by the statute is proof that the statute (at least as applied to the current facts) is itself unconstitutional content and viewpoint discrimination. Plaintiffs cannot win such an argument. The "adverse effect[s]" of the statute are not relevant to its facial viewpoint and content neutrality; only the legislative intent counts. *McGuire I*, 260 F.3d at 43. By themselves, acts of private parties under the statute are merely examples of how the statute is adversely affecting one side more than another. Plaintiffs thus cannot use private actions to challenge the statute itself. The only challenge they have left in this case is to the way the law has been enforced. *Lugar* and related cases stand for the proposition that "enforcement" of a state statute by purely private individuals, without some involvement by state officials, does not constitute state action; hence plaintiffs' activity must be linked to the state's enforcement efforts somehow. *See, e.g.*, **[*61]** *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622-24, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991); *Lugar*, 457 U.S. at 941-42, 102 S. Ct. 274; *Flagg Bros. v. Brooks*, 436 U.S. 149, 164-66, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978).

We turn now to the appropriate standard against which to measure the as-applied attack.

The Standard

McGuire I recognized that while the statute was valid on its face, it was still possible that enforcement against a given person in a particular situation could be invalid on an as-applied basis. Plaintiffs were afforded the opportunity to show on remand that they were such persons.

There are different types of as-applied attacks. The most common situation is where the language of a statute is broad and could potentially cover many different types of fact situations; the as-applied challenge is then an attempt to "specify" the law by freshly testing its constitutionality in one particular fact situation while refusing to adjudicate the constitutionality of the law in other fact situations.[5] *See United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 477-78, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995) (act prohibiting receipt of honoraria by government employees in return for speeches and writings was unconstitutional as applied to lower-level executive employees, the parties to the case, but not necessarily as to senior employees); *United States v. Raines*, 362 U.S. 17, 23-25, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960) (refusing to declare an act facially unconstitutional where the act might be unconstitutional as applied to private actors but is certainly not unconstitutional as applied to public officials, and the parties challenging the law were public officials); Fallon, *supra*, at 1329-35 (explaining this sort of specification as the paradigmatic type of as-applied

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[5] It is in reference to this sort of as-applied challenge that the court in *Foti v. City of Menlo Park*, 146 F.3d 629 (9th Cir.1998), observed that an as-applied challenge is an independent claim from a claim that the law is being enforced in a viewpoint discriminatory way. The *Foti* court observed that a claim "that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others" is a separate inquiry from whether "discriminatory enforcement of a speech restriction amounts to viewpoint discrimination in violation of the First Amendment." *Id.* at 635. The type of as-applied challenge raised by plaintiffs, however, is exactly the same as a claim that discriminatory enforcement of a statute has led to viewpoint discrimination.

challenge). The fact situation that plaintiffs are involved in here is the core fact situation intended to be covered by this buffer zone statute, and it is the same type of fact situation that was envisioned by this court when the facial challenge was denied in *McGuire I*; plaintiffs do not and cannot argue that they are different types of actors, or that they are involved in a different type of fact situation, from the ones on the basis of which the law was already upheld facially. Plaintiffs' as-applied challenge must be of a different sort.[6]

Plaintiffs' as-applied challenge must be based on the idea that the law itself is neutral and constitutional in all fact situations, but that it has been enforced selectively in a viewpoint discriminatory way. **[*62]** *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002) (licensing scheme itself was constitutional but, if in course of enforcing the act, the licensing authority "[g]rant[ed] waivers to favored speakers (or, more precisely, den[ied] them to disfavored speakers)," then the licensing authority would be acting unconstitutionally). Such a challenge is dependent on the factual evidence provided as to how the statutory scheme has in fact operated vis-á-vis the plaintiffs.

The exact claim is that in practice the government has engaged in viewpoint discrimination by failing to enforce the statute against persons who violate the statute by expressing pro-abortion/pro-choice views without consent in the six-foot buffer zone, while enforcing the statutory prohibitions against those in the same position who express antiabortion/pro-life views. The essence of a viewpoint discrimination claim is that the government has preferred the message

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[6] Nor is this a situation where the text of a statute does not give fair warning that it applies to a certain set of facts. *See Raines*, 362 U.S. at 22-23, 80 S. Ct. 519 ("Perhaps cases can be put where their application to a criminal statute would necessitate such a revision of its text as to create a situation in which the statute no longer gave an intelligible warning of the conduct it prohibited." (citing *United States v. Reese*, 92 U.S. 214, 219-220, 23 L. Ed. 563 (1875))).

of one speaker over another. The general principle is that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984); *see also Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) (viewpoint discrimination occurs when speech is regulated where "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."). The viewpoint discrimination doctrine has been thought by one commentator to have two ultimate constitutional justifications: 1) fear of "impermissible reasons for governmental action," and 2) fear of the "skewing effects on the system of free expression." *See* Cass R. Sunstein, *Half-Truths of the First Amendment*, 1993 U. Chi. Legal F. 25, 26-27.

Viewpoint discrimination claims themselves may occur in different contexts. One such context occurs when the state decides whether or not to impose criminal penalties based on the viewpoint expressed by someone's words. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). That is not this case. Here, both pro-abortion and anti-abortion speech is prohibited in the six-foot floating buffer zone, so long as there is no consent. Another sort of context involves government funding of speech, where viewpoint discrimination is permitted in some situations, *see Rust v. Sullivan*, 500 U.S. 173, 192-95, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), but not in all, see *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548-49, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001). That is also not this case. Rather, this case involves a claim that the government enforces the law against persons of one viewpoint who violate the statute while not enforcing the law against similarly situated persons of the opposing viewpoint who also violate the statute.

The First Amendment viewpoint discrimination claim that is made here is, by its terms, a claim of discrimination.

Plaintiffs argue that the district court confused this doctrine with the Equal Protection Clause's anti-discrimination doctrine concerning selective enforcement of criminal laws. However, plaintiffs do not address what substantive differences exist.

There are at least two differences that might be relevant between this case and the typical case in which a claim of equal protection discriminatory enforcement is made. First, this is a First Amendment challenge based on viewpoint discrimination, not an equal protection challenge based on discriminatory enforcement of **[*63]** the laws. Second, here a plaintiff in a civil action is bringing this claim to support desired injunctive relief; in the typical equal protection discriminatory enforcement case, the challenge is brought by a defendant offering a defense to a criminal prosecution.

The issue of whether the two standards differ deserves brief discussion here, but we need not resolve it, because plaintiffs lose under even the standard most favorable to them. The primary potential difference concerns the role of intent: in equal protection cases, plaintiffs must show that the relevant government actor intended to discriminate against the disfavored group. *See, e.g., Wayte v. United States*, 470 U.S. 598, 608, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979). Intent, in this context, means more than mere knowledge by the government actor that a policy has a discriminatory effect; the government agent must have adopted the policy because of, and not despite, its discriminatory impact. *See Wayte*, 470 U.S. at 610, 105 S. Ct. 1524; *Feeney*, 442 U.S. at 279, 99 S. Ct. 2282. Impermissible intent is difficult to demonstrate in the kind of selective enforcement claim being brought by the plaintiffs here. When wearing its prosecutor hat, the government has a great number of legitimate, nondiscriminatory reasons for the actions it takes to engage in or decline prosecution.

We think that some showing of intent on the part of government officials probably is necessary to make out an

as-applied First Amendment viewpoint discrimination claim in this case. This statute was held facially constitutional based on the fact that the legislative motivations in passing it were content-neutral motivations. The fact that one side of the abortion debate might suffer some incidental adverse effects or burdens did not defeat the statute's constitutionality. If we require invidious legislative intent to make this kind of otherwise content-neutral statute content or viewpoint discriminatory, then there seems no reason why we should not require invidious intent by the enforcers to take this statute outside of the category of content-neutrality now. Unless government actors were to intentionally enforce the statute unequally, then any evidence of inequality that plaintiffs were to show would merely indicate a "disproportionate[ ] burden[ ]" that would not signify viewpoint discrimination. *McGuire I*, 260 F.3d at 44.

The role that traditional pattern evidence (statistical studies and the like) can play in a traditional equal protection challenge is limited by the fact that courts have been loathe to infer intent from mere effect, although the Supreme Court has consistently noted that such an inference is possible. *See Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . . But such cases are rare." (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886))); *see also Feeney*, 442 U.S. at 275, 99 S. Ct. 2282 (it may be appropriate to infer intent from disproportionate impact where the impact is unexplainable on other grounds); *Washington v. Davis*, 426 U.S. 229, 241-42, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976) (pattern evidence may be a piece of the inquiry into finding intent from "the totality of the relevant facts"). Perhaps the standard for allowing such an inference of intent from a pattern of impact would be more plaintiff-friendly in context, given the special place that First Amendment **[*64]** rights have traditionally held in our constitutional jurisprudence. *See, e.g., Palko v. Conn.*, 309 U.S.

319, 327, 58 S. Ct. 149, 82 L. Ed. 288 (1937) (Freedom of speech is "the matrix, the indispensable condition, of nearly every other form of freedom.").

At any rate, we need not consider this further. The Supreme Court has stated that in order to win a viewpoint discriminatory enforcement challenge against a law that is facially neutral, the challenger would need to show "a pattern of unlawful favoritism." *Thomas*, 534 U.S. at 325, 122 S. Ct. 775. We turn now to the issue of whether plaintiffs have raised a genuine issue of material fact as to the existence of such a pattern.

Genuine Issue of Material Fact

The district court held that on the facts plaintiffs had not shown that the enforcement of the statute amounted to viewpoint discrimination. That conclusion was based on several subsidiary conclusions. First, the relevant police departments, Boston and Brookline, had in fact adopted the Attorney General's construction of the Act. As a result, the "employees or agents" exemption did not in practice excuse unconsented speech that was pro-abortion within the six-foot floating buffer zone. *See McGuire*, 271 F. Supp. 2d at 342-43. Second, plaintiffs produced no evidence that in enforcing the Act the state was "ignoring the speech activities of favored speakers (or . . . prosecuting, issuing warnings, or unduly beleaguering only disfavored speakers)." *Id.* at 341. In fact, the state had enforced the Act in the same manner as to both viewpoints, giving warnings to those of both viewpoints who apparently violated the Act and using arrest powers only after multiple warnings.

We first discuss the relevance of the Attorney General's interpretation of the "employees or agents" exemption in this as-applied context. Plaintiffs protest mightily that we must not give the Attorney General's interpretation any weight, given that it is inconsistent with the plain meaning of the statute and that is not binding in any way for the future. We do not think that the interpretation is inconsistent with the statute's plain meaning. In fact, as we explained in *McGuire I*, we find the Attorney General's interpretation to

be one very likely interpretation of the exemption's language. *See McGuire I*, 260 F.3d at 47. Further, it makes no difference that the Attorney General's interpretation is nonbinding for the future. This as-applied challenge must, logically, be aimed at past conduct; we cannot speculate as to future enforcement patterns. The Attorney General's interpretation, therefore, is important for our purposes merely because it is clearly a proper, content-neutral way of interpreting the exemption; thus, to the extent that the police have adhered to it in their actual enforcement practices, there are no grounds for holding their enforcement viewpoint discriminatory.

We turn to the evidence. Plaintiffs have produced evidence that some escorts tell patients that they do not have to listen to the plaintiffs. Plaintiffs also produced evidence that some escorts have tried to drown out the words of the plaintiffs. There is further some evidence that some escorts have taken anti-abortion leaflets out of the hands of patients. There is no evidence that patients did not consent to almost all of the takings of these leaflets. None of these three kinds of acts is self-evidently a violation of the statute as interpreted by the Attorney General. We look for other evidence that pro-choice advocates violated the statute.

Zarella's deposition reported that she had heard escorts repeating "[p]ro-abortion rhetoric." But the only further specifics **[*65]** she gave were of escorts saying things like "We have help. We'll help you get inside." Statements like these are not violations of the Act under the Attorney General's interpretation.

More importantly, even if the plaintiffs have produced some evidence that pro-abortion individuals violated the statute, they are stymied because there is no evidence that the police turned a blind eye toward pro-abortion speech while not turning a blind eye to possible transgressions by plaintiffs. The evidence shows that the police responded to all incidents involving pro-abortion personnel to which they

have been made aware.[7] They cannot be expected to be made aware of every incident, particularly when, as the district court noted, "none of the plaintiffs has complained to the police or to any other law enforcement authority about any oral protests, education, or counseling being engaged in by employees and agents at clinic entrances." *McGuire*, 271 F. Supp. 2d at 340.

Warnings have been given to both sides. The district court was correct in concluding that even if all of the warnings given to clinic employees and agents were for physical aggressiveness and not for speech, those warnings still helped to show that the Act was being applied evenhandedly because they served the purposes of the Act. *McGuire*, 285 F. Supp. 2d at 87-88. Plaintiffs make much of the fact that no pro-abortion person has been arrested for violating the Act, but this fact does not help plaintiffs because there is no evidence that it is anything other than a byproduct of the police's "flexible" enforcement policy, which seeks to warn extensively before arresting. This enforcement policy, on the evidence, has been applied evenhandedly to both sides, and in fact only one anti-abortion protestor has been arrested for violating the Act.

Plaintiffs raise one final issue when they argue that their evidence shows that the police have interpreted and used the entry and exit exemption as a loophole for the rest of the law. Police have instructed escorts always to enter the clinic, plaintiffs say, because police have interpreted the exemption for people "entering or leaving" an RHCF to protect escorts who enter the clinic even if they protest, edu-

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[7] The plaintiffs' argument that the police station themselves too far away from the buffer zone area for them to determine if the Act has been violated does not properly lead to an inference that the police are enforcing the statute in a viewpoint discriminatory manner. There are many legitimate law-enforcement reasons for police to station themselves further away from the clinic: they may be able to see more of the total scene from that position, it may be the best position from which to respond to violence, and they may be worried about intimidating patients if they were to stand very close to or inside the fixed buffer zone.

cate, or counsel within six feet of a patient without that patient's consent. Essentially, they argue, the police's use of the enter/exit exemption has eviscerated the Attorney General's content-neutral interpretation of the "employees or agents" exemption. The evidence does not support the plaintiffs' claim. Even if the escorts have accompanied the patient through the doors into the clinic, there is no evidence they have proselytized as they did so.

Because there is no evidence that the police have enforced this statute in anything other than an evenhanded way, the district court correctly entered summary judgment for the defendants on the as-applied claim.

IV.

The district court's grants summary judgment for the defendants on the facial **[*66]** claim and on the as-applied claim are affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MARY ANNE MCGUIRE, *et al.*,

Plaintiffs,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Defendants.

No. CIV.A. 00-12279-EFH

Sept. 29, 2003

[285 F. Supp. 2d 82]

MEMORANDUM AND ORDER

HARRINGTON, Senior District Judge.

This case has involved a facial and an as applied constitutional challenge to Mass. Gen. L. ch. 266, § 120E 1/2's exemption for abortion clinic employees and agents.

The instant matter now pending before the Court is Plaintiffs' Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e) filed subsequent to the Court's granting of Defendants' Motion for Summary Judgment on plaintiffs' as applied challenge to Mass. Gen. L. ch. 266, Section 120E 1/2. *McGuire, et al. v Reilly, et al.*, 271 F. Supp. 2d 335 (D. Mass. 2003).

At issue is the constitutionality of the Massachusetts statute, Mass. Gen. L. ch. 266, Section 120E 1/2, that regulates speech-related conduct within eighteen feet of reproductive health care facilities. The specific section of the statute that is challenged imposes both criminal and civil penalties on persons who knowingly approach another person, within six feet of such person, "for the purpose of pass-

ing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling," unless the targeted individual consents to such approach.[1] Exempted from the statute are "persons entering or leaving such facility" and "employees or agents of such facility acting within the scope of their employment."[2] The question is whether the First Amendment rights of the speaker are abridged by the protection the statute provides for the unwilling listener.

Plaintiffs Mary Anne McGuire, Ruth Schiavone and Jean B. Zarrella are three private citizens who regularly travel to the sidewalks and public ways in front of and near reproductive health care facilities, attempting to dissuade women from having abortions by engaging in counseling activities, including distributing leaflets and engaging in oral conversations. Plaintiffs allege that their fear of criminal prosecution caused them to be chilled in their exercise of fundamental constitutional rights.

The Court held the Act, Mass. Gen. L. ch. 266, Section 120E 1/2, facially unconstitutional because under the Act employees and agents of abortion clinics have the right to

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[1] Mass.Gen.L. ch. 266, Section 120E 1/2 (b). The statute reads in relevant part: "No person shall knowingly approach another person or occupied motor vehicle within six feet of such person or vehicle, unless such other person or occupant of the vehicle consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of 18 feet from any entrance door or driveway to a reproductive health care facility or within the area within a rectangle not greater than six feet in width created by extending the outside boundaries of any entrance door or driveway to a reproductive health care facility at a right angle and in straight lines to the point where such lines intersect the sideline of the street in front of such entrance door or driveway." *Id.* This specific section of the statute is ruled severable from the complete statute itself.

[2] *See* Section 120E 1/2 (b)(1-2). Also exempted are various law enforcement and emergency personnel, and persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility. Section 120E 1/2 (b)(3-4).

express their pro-abortion views within the restricted areas; whereas anti-abortion protestors are prohibited from expressing their anti-abortion views within the same areas. *McGuire, et al. v. Reilly, et al.*, 122 F. Supp. 2d 97 (D. Mass. 2000).

[*85] The Court of Appeals for the First Circuit held the Act facially constitutional, although the Act accorded differential treatment to the statutory right to express two disparate views on the subject of abortion, on the ground that it promoted public safety, personal security, smooth traffic flow and effective medical services.

The Court of Appeals further ruled that there was no evidence that employees and agents had in fact utilized their statutory exemption as a means to protest, educate or counsel. *McGuire, et al. v. Reilly, et al.*, 260 F.3d 36 (1st Cir. 2001). The Court of Appeals stated that if employees and agents do in fact utilize their statutory exemption to engage in preferential pro-abortion advocacy *"the plaintiffs remain free to challenge the act, as applied, in a concrete factual setting."*[3] *Id.* at 47. (Emphasis supplied)

Thereupon plaintiffs contended that the Act is unconstitutional, as applied, on the ground that employees and agents of the abortion clinics do in fact utilize their statutory exemption to engage in preferential pro-abortion advocacy within the restricted areas.

The issue raised was whether the defendants have applied the statutory clinic and agent exemption to permit the expression of a pro-abortion viewpoint by clinic employees

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[3] In an "as-applied" challenge, a plaintiff "contends that application of [a] statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional," *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1012, 113 S. Ct. 633, 121 L. Ed. 2d 564 (1992) (Scalia, J., Rehnquist, C.J., and White, J., dissenting), *denying cert.* to 962 F.2d 1366 (9th Cir.1992), and asks only that the reviewing court declare the challenged statute unconstitutional on the facts of the particular case. *Sanjour v. Environmental Protection Agency*, 56 F.3d 85, 92 n.10 (D.C. Cir. 1995).

and agents, while simultaneously prohibiting plaintiffs from articulating an opposing, anti-abortion message within the same restricted areas. After discovery was concluded, the Court granted Defendants' Motion for Summary Judgment on this issue. *McGuire, et al. v. Reilly, et al.*, 271 F. Supp. 2d 335 (D. Mass. 2003).

In their Motion for Summary Judgment as to the as applied challenge, defendants did not dispute the fact that abortion clinic employees and agents were utilizing their statutory exemption as a means to protest, educate or counsel.[4]

In view of this undisputed fact, the Court, in accordance with the Court of Appeals' directive, might have been required to rule that the Act was unconstitutional, as applied. However, there was a substantial change of circumstances since the Court of Appeals issued its decision: The Attorney General of Massachusetts has interpreted the Act's prohibitions against oral protest, education or counseling within the restricted areas to apply evenhandedly to both clinic employees and agents and to anti-abortion protesters, and such interpretation was adopted by the law enforcement authorities in those jurisdictions where the plaintiffs were expressing their pro-life message. The Court ruled that the plaintiffs had failed to present evidence that the law enforcement authorities **[*86]** were not evenhandedly enforcing the Attorney General's interpretation of the Act's prohibitions against both pro-life protesters and pro-choice clinic employees and agents within the restricted areas and that no genuine issue of material fact had been raised.

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[4] It was on the basis of the Act's exemption for clinic employees and agents that the Court held the Act to be *facially* unconstitutional. *McGuire, et al. v. Reilly, et al.*, 122 F. Supp. 2d 97 (D. Mass. 2000). The Court indicated that employees and agents had *exercised* their statutory right to protest, educate or counsel based on their financial and philosophical incentive to do so, their function as volunteer escorts "to help provide safe, unimpeded clinic access for women," and common experience which teaches that a statutory right is ultimately exercised. This finding has since been supported by evidence developed during discovery.

The Court, in granting Defendants' Motion for Summary Judgment, stated that its decision did not foreclose the plaintiffs or other pro-life protesters from initiating a subsequent action against the defendants challenging the constitutionality of the Act, as applied, in a concrete factual setting should there be evidence that clinic employees and agents are in fact utilizing their statutory exemption as a means to protest, educate or counsel and that the Act's exemption for clinic employees and agents is not being enforced in accordance with the Attorney General's interpretation of the Act requiring evenhanded enforcement of its prohibitions against all sides of the abortion debate, including clinic employees and agents, within the restricted areas. The Court also stated that a subsequent action may also be commenced by plaintiffs or other pro-life protesters if the Attorney General's interpretation of the Act is changed so as not to require evenhanded enforcement of its prohibitions against both pro-life protesters and clinic employees and agents within the restricted areas.

The Court ruled, in brief, for the Act to remain invulnerable to an as-applied constitutional challenge, the Attorney General's interpretation must remain unchanged and the law enforcement authorities must vigorously enforce such interpretation.[5]

The plaintiffs raise only one issue[6] in their Motion to Alter or Amend Judgment which requires to be addressed by

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[5] The Legislature could amend the Act by redrafting the exemption for clinic employees and agents to expressly comport with the Attorney General's interpretation and, thus, cure any potential constitutional infirmity. For the Attorney General's interpretation has eliminated the potential constitutional defect for only so long as such interpretation is being enforced and such interpretation is continued in effect by the Massachusetts courts.

[6] The Court does not address the other two issues raised by plaintiffs, namely, that the Court applied an unnecessarily narrow view of as applied constitutional challenges, and impermissibly allowed the government to obtain a judgment by voluntarily changing its conduct to undercut

the Court, namely, whether there is a genuine issue of material fact foreclosing the granting of summary judgment, as plaintiffs claim that the Court allegedly overlooked four areas of evidence from which a reasonable factfinder could infer that the Act is not being evenhandedly enforced in accordance with the Attorney General's interpretation of the "employee and agent" exemption from the Act's prohibitions.

The plaintiffs presented evidence that (1) clinic employees and agents have engaged and continue to engage in "oral protest, education or counseling" within the restricted areas, yet the government has never made a single arrest, nor brought a single prosecution against any clinic employee or agent exempted under the express terms of the Act; that (2) no police officer has been stationed in a position to be able to listen to the speech of clinic employees and agents in order to ascertain whether they are engaged in speech activities prohibited by the Act; that (3) no police officer has ever issued a warning to a clinic employee or agent for speech activities prohibited by the Act, as the only warnings issued to clinic escorts have been for their physical aggressiveness; whereas plaintiffs and their fellow [*87] pro-life protesters have received repeated warnings and arrest threats from the police for their speech activities prohibited by the Act; and that (4) police officers have instructed clinic employees and agents to enter and exit the clinics so as to fall under the "enter and exit" exemption in the Act and thereby circumvent and render irrelevant the Attorney General's interpretation of the "employee and agent" exemption.

The defendants respond that the Court properly concluded that the plaintiffs failed to produce evidence that the "employee and agent" exemption is not being evenhandedly enforced by the law enforcement authorities in accordance with the Attorney General's interpretation.

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the basis for plaintiffs' challenge, resting on its legal reasoning in *McGuire, et al. v. Reilly, et al.*, 271 F. Supp. 2d 335 (D. Mass. 2003)

Plaintiffs claim that the Act's prohibitions are not being evenhandedly enforced against both pro-life advocates and pro-abortion escorts can be inferred by the failure of law enforcement to arrest or prosecute any clinic employee or agent who has engaged and continues to engage in pro-abortion speech within the restricted areas under the express terms of the Act's exemption. However, such evidence does not show that the government has enforced the Act unequally. The Attorney General has interpreted[7] the Act to prohibit clinic employees and agents from expressing a pro-abortion viewpoint, or from attempting to counsel or educate patients, within the restricted areas. And law enforcement authorities have adopted the Attorney General's construction of the Act, thus rejecting the notion that the employee and agent exemption protects employees and agents who express their views on abortion to patients within the restricted areas. Although no employee or agent has been arrested or prosecuted, neither has any plaintiff, and only one person (a pro-life protester) has been arrested for violation of the Act, but only after repeated warnings over a period of months. As fully discussed in *McGuire, et al. v. Reilly, et al.*, 271 F. Supp. 2d 335 (D. Mass. 2003), clinic escorts' (who are private parties) alleged violations of the Act cannot be a proper basis for a declaration that state officials have violated the Constitution. A violation of the Fourteenth Amendment may result only from state action and the Court has no grounds upon which to attribute the actions of private escorts to the State, and the plaintiffs' as applied challenge to the constitutionality of the Act, therefore, may not be based on these actions. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001).

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[7] The Attorney General has interpreted the Act to exempt clinic employees and agents from the Act's restrictions *only* when they assist patients to secure safe, unimpeded clinic access, but not if they protest, educate or counsel the patients.

As to plaintiffs' argument that police officers have failed to station themselves in a position to listen to what escorts say in order to determine whether the Act is being violated, police officers must be able to exercise reasonable judgment in deciding how best to observe activities at the clinics in order to maintain order there. It is to be noted that none of the plaintiffs has ever complained to the police stationed at the clinics about the conduct of the escorts at clinic entrances.

As to plaintiffs' argument that the only warnings given to clinic employees and agents by police officers were for "physical aggressiveness" and not for speech activities prohibited by the Act, an escort that is "overly aggressive" in assisting patients into the clinic might well be viewed by a police officer as exceeding the scope of the clinic employee and agent exemption which **[*88]** was designed to protect only those "who work to secure peaceful access" to the clinics. *McGuire, et al. v. Reilly, et al.*, 260 F.3d at 47.[8] The police would advance the purposes of the Act by warning escorts against "putting their arms out [to] fend off people who walk up to them." Such action on the part of the police could make it less difficult for pro-life protesters to request consent from the escort's patient to approach and counsel her about alternatives to abortion. Both pro-life protesters and clinic escorts have received warnings by the police of potential violations of the Act and the police departments have made it their policy to arrest individuals only after issuing a warning to anyone engaging in particular conduct appearing to violate the Act.

As to plaintiffs' argument that police officers have instructed employees and agents to enter and exit the clinics so as to fall under the "enter and exit" exemption, clinic em-

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[8] According to the Attorney General's interpretation, employees and agents are exempted from the Act's speech restrictions *only* as necessary to perform such duties within the scope of their employment, as helping patients gain safe access to a clinic, but not to use their status to engage in "protest, education or counseling."

ployees and agents do not fall within the Act's exception for "persons entering or leaving" a clinic merely by stepping in and out of the clinics. That exemption applies only to persons with legitimate business inside the clinic, such as patients and those accompanying them, and not to employees and agents who are covered by a separate and distinct exemption. Plaintiffs, moreover, produced no evidence as to the reasons why the police might have given such instructions to employees and agents and under what circumstances.

Plaintiffs must prove that the government does not enforce the Act evenhandedly according to the Attorney General's neutral interpretation. *See City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) (Court found no viewpoint discrimination where the "text of the [challenged] ordinance is neutral . . . and the District Court's findings indicate that it has been applied to appellees and others in an evenhanded manner.") Thus, with respect to their as applied claim, the plaintiffs are properly required to establish that a neutral provision "is not being evenhandedly enforced." *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002) (petitioners' First Amendment claim against neutral permit requirement for public rallies should be addressed only "if and when a pattern of unlawful favoritism appears" in the way City issues permits); *New England Council of Carpenters v. Kinton*, 284 F.3d 9, 26 (1st Cir. 2002) (court should adjudicate alleged abuses of government discretion to apply leafletting restrictions only if and when the statute is unfairly enforced).

The aforesaid evidentiary factors fail to raise a genuine issue of material fact that law enforcement officials were not evenhandedly enforcing the Attorney General's interpretation of the Act against both pro-life protesters and clinic employees and agents but rather were according "preferential" treatment to the "pro-choice" speech of clinic employees and agents. The Court denies Plaintiffs' Motion to Alter or Amend Judgment. Plaintiffs must submit specific evidence

that they have been harmed by discriminatory enforcement of the Act. "[C]hallenging a rule 'as-applied' often requires more specific allegations of harm than are necessary to test facial validity." *Kines v. Day*, 754 F.2d 28, 30 (1st Cir. 1985). "[O]nce [a] rule has been adjudged constitutional on **[*89]** its face there is no presumption of harm . . . [and a] 'plaintiff . . . must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" *Id.* at 31, quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301. 60 L. Ed. 2d 895 (1979).

The Court acknowledges that the plaintiffs have raised a serious question on a matter of profound political, moral and legal significance.[9] For this reason the Court reiterates its advisory issued in *McGuire, et al. v. Reilly, et al.*, 271 F. Supp. 2d 335 (D. Mass. 2003), that plaintiffs should closely observe the conduct of law enforcement authorities and, if they develop sufficient evidence that such officials are failing to evenhandedly enforce the Attorney General's interpretation of the "employee and agent" exemption, then to initiate a new action challenging the as applied constitutionality of the Act. This course of action would constitute the most prudent use of both legal and judicial resources.[10] Even-

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[9] That matter is the constitutional mandate of full and fair access to the public forum for free and open debate on such awesome questions as to when life begins and who has the authority to terminate innocent human life—to decide who is to live and who is to die, and under what conditions, and, more specifically, does the "unborn person" have "certain unalienable Rights," such as the right to life, and, if so, can such a right be abolished by an individual's private fiat.

[10] If, after such observations, it is determined that law enforcement is evenhandedly enforcing the Attorney General's interpretation of the Act, the plaintiffs will have achieved fair and equal access to the public square to promulgate their pro-life message; if not, then they will have developed sufficient evidence to establish their case that defendants are silencing their pro-life speech, while protecting the voices of the pro-abortion clinic employees and agents within the restricted areas. Vigilant observance of police conduct should insure strict enforcement of the Attorney General's interpretation which has been adopted by their police departments.

handed enforcement of the Act would foster free speech in the public forum by securing equal access to the rostrum by advocates on all sides of the intense abortion debate. For a vigorous body politic is achieved only by the free and equal expression of conflicting ideas[11] on serious public issues. Thus, the enforcement of the Act must insure that the voices of those pleading to shield the gift of life must be protected to the same extent as their pro-choice adversaries so that both views have an equal opportunity to influence the formulation of public policy on an ultimate issue that will continue to provoke a vigorous clash of ideas.[12]

Plaintiffs' Motion to Alter or Amend Judgment is denied.

SO ORDERED.

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[11] The intense national debate on abortion is based on a profound and serious philosophical and biological dispute between so-called pro-life advocates who are morally convinced that an unborn child is a living human person whose right to life should be secured by the protections of the United States Constitution and so-called pro-choice advocates who are as convinced that the unborn child is not such a living human person and that the unborn child's mother has the choice to terminate the life of her unborn child, even, in some instances, of a child partially born.

[12] Since the opposing views on the abortion issue are both rooted in deeply held beliefs on the elemental matter of life and death, the debate will long continue. Those who oppose abortion believe that no one has the right to terminate innocent human life; those who support abortion believe that a woman has the right to choose to destroy the fetus within her body. *See McGuire, et al. v. Reilly, et al.*, 271 F. Supp. 2d 335, 344 n.11 (D. Mass. 2003).

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MARY ANNE MCGUIRE, *et al.*,

Plaintiffs,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Defendants.

No. CIV.A. 00-12279-EFH

July 9, 2003

[271 F. Supp. 2d 335]

MEMORANDUM AND ORDER

HARRINGTON, Senior District Judge.

This matter involves Defendants' Renewed Motion for Summary Judgment as to plaintiffs' as-applied constitutional challenge to Mass. Gen. L. ch. 266, § 120 1/2's exemption for abortion clinic employees and agents. The Court previously denied Defendants' Motion for Summary Judgment on this issue. *McGuire, et al. v. Reilly, et al.*, 230 F. Supp. 2d 189 (D. Mass. 2002).[1] In said decision and prior to setting a hearing on the merits to determine whether clinic employees and

[1] Pursuant to the First Circuit's decision in *McGuire, et al. v. Reilly, et al.*, 260 F.3d 36 (1st Cir. 2001), this Court shall not entertain any facial challenge to the Act's constitutionality. This Court must abide by the decision in McGuire that on its face, the Act, including its exemptions, is both content-neutral and viewpoint-neutral, and does not on its face violate the Constitution of the United States. The Defendants' Motion for Summary Judgment on the facial challenge was allowed in *McGuire, et al.* 230 F. Supp. 2d at 193 n.10.

agents have engaged in oral protest, education or counseling within the restricted areas, the Court extended the discovery period for six months. This was done to afford the parties the opportunity to determine whether any such conduct is frequent or sporadic and whether the Act's exemption for clinic employees and agents is being applied in accordance with the Attorney General's interpretation of the Act requiring evenhanded enforcement of its prohibitions against all sides of the abortion debate, including clinic employees and agents. The Court also indicated to the parties that it would entertain a renewed Motion for Summary Judgment at the close of the extended discovery period.

At issue is the constitutionality, as applied, of the Massachusetts statute, Mass. Gen. L. ch. 266, Section 120E 1/2, that regulates speech-related conduct within eighteen feet of reproductive health care facilities. The specific section of the statute that is challenged imposes both criminal and civil penalties on persons who knowingly approach another person, within six feet of such person, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling," unless the targeted individual consents to such approach.[2] Exempted from the statute are "persons entering or leaving such facility" and "employees or agents of such facility acting within the scope

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[2] Mass. Gen. L. ch. 266, Section 120E 1/2 (b). The statute reads in relevant part: "No person shall knowingly approach another person or occupied motor vehicle within six feet of such person or vehicle, unless such other person or occupant of the vehicle consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of 18 feet from any entrance door or driveway to a reproductive health care facility or within the area within a rectangle not greater than six feet in width created by extending the outside boundaries of any entrance door or driveway to a reproductive health care facility at a right angle and in straight lines to the point where such lines intersect the sideline of the street in front of such entrance door or driveway." *Id.* This specific section of the statute is ruled severable from the complete statute itself.

of their employment."[3] The question is whether the [*338] First Amendment rights of the speaker are abridged by the protection the statute, as applied, provides for the unwilling listener.

Plaintiffs Mary Anne McGuire, Ruth Schiavone and Jean B. Zarella are three private citizens who regularly travel to the sidewalks and public ways in front of and near reproductive health care facilities, attempting to dissuade women from having abortions by engaging in counseling activities, including distributing leaflets and engaging in oral conversations. Plaintiffs allege that their fear of criminal prosecution caused them to be chilled in their exercise of fundamental constitutional rights.

Plaintiffs filed a Complaint praying for a declaration that the Massachusetts statute is facially invalid and seeking an injunction against its enforcement. They alleged that Mass. Gen. L. ch. 266, Section 120E 1/2 is facially unconstitutional because it violates their right to freedom of speech under the First and Fourteenth Amendments to the United States Constitution. Specifically, plaintiffs claim three causes of action: (1) a violation of the First Amendment's Freedom of Speech Clause; (2) a violation of the Equal Protection Clause of the Fourteenth Amendment; and (3) a violation of the Due Process Clause of the Fourteenth Amendment. The several named defendants are those state officers empowered to prosecute violators of the laws of the Commonwealth, and are represented by the Attorney General of the Commonwealth of Massachusetts.

The issue originally before this Court was whether, on its face, the statute is unconstitutional in any of the following four respects. First, whether the Act's explicit singling out of reproductive health care facilities indicates that it is a

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[3] *See* Section 120E 1/2 (b)(1-2). Also exempted are various law enforcement and emergency personnel, and persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility. Section 120E 1/2 (b)(3-4).

content-based regulation of speech. Second, whether the exemption for certain people, particularly employees and agents of the facilities, represents impermissible governmental protection for one side of the abortion debate, while abridging fundamental free speech rights of the other. Third, whether the process for physically marking the buffer zones amounts to a discriminatory activation provision. Fourth, whether the language of the statute, aimed primarily at oral communications, reveals that its true intent is the suppression of speech rather than any of the four stated purposes[4].

This Court held the Act, Mass. Gen. L. ch. 266, Section 120E 1/2, facially unconstitutional because under the Act employees and agents of abortion clinics have the right to express their pro-abortion views within the restricted areas; whereas anti-abortion protestors are prohibited from expressing their anti-abortion views within the same areas. *McGuire, et al. v. Reilly, et al.*, 122 F. Supp. 2d 97 (D. Mass. 2000).

The Court of Appeals for the First Circuit held the Act facially constitutional, although the Act accorded differential treatment to the statutory right to express two disparate views on the subject of abortion, on the ground that it promoted public safety, personal security, smooth traffic flow and effective medical services.

[*339] The Court of Appeals further ruled that there was no evidence that employees and agents had in fact exer-

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[4] Section 1 of S.B. No. 148 reads: "The purpose of this act is to:—(a) increase the public safety in and around reproductive health care facilities; (b) maintain the flow of traffic and prevent congestion around reproductive health care facilities; (c) enact reasonable time, place and manner restrictions to reconcile and protect both the first amendment rights of persons to express their views, assemble and pray near reproductive health care facilities and the rights of persons seeking access to such facilities to be free from hindrance, harassment, intimidation and harm; and (d) create an environment in and around reproductive health care facilities which is conductive to safe and effective medical services, including surgical procedures, for patients."

cised their statutory right to protest, educate or counsel[5]. *McGuire, et al.*, 260 F.3d 36. The Court of Appeals stated that if employees and agents do in fact exercise their statutory right to engage in preferential pro-abortion advocacy *"the plaintiffs remain free to challenge the act, as applied, in a concrete factual setting."*[6] *Id.* at 47. (Emphasis supplied)

The plaintiffs contend that the Act is unconstitutional, as applied, on the ground that employees and agents of the abortion clinics do in fact *exercise* their statutory right to engage in preferential pro-abortion advocacy within the restricted areas.

The issue now pending before this Court is whether the defendants have applied the statutory clinic and agent exemption to permit the expression of a pro-abortion viewpoint by clinic employees and agents, while simultaneously prohibiting plaintiffs from articulating an opposing, anti-abortion message within the same restricted areas.

The defendants have renewed their motion for summary judgment which presents the argument that any as-applied constitutional challenge brought by the plaintiffs must fail on the ground that the state has not yet applied the Act to the plaintiffs in a way that violates the plaintiffs' constitutional

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[5] This Court had previously indicated that employees and agents had *exercised* their statutory right to protest, educate or counsel based on their financial and philosophical incentive to so do, their function as volunteer escorts "to help provide safe, unimpeded clinic access for women" (Exhibit 1), and common experience which teaches that a statutory right is ultimately exercised. *McGuire, et al.*, 122 F. Supp. 2d 97. This finding has since been supported by evidence developed during discovery.

[6] In an "as-applied" challenge, a plaintiff "contends that application of [a] statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional," *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1012, 113 S. Ct. 633, 121 L. Ed. 2d 564 (1992) (Scalia, J., Rehnquist, C.J., and White, J., dissenting), *denying cert. to* 962 F.2d 1366 (9th Cir.1992), and asks only that the reviewing court declare the challenged statute unconstitutional on the facts of the particular case. *Saniour v. Environmental Protection Agency*, 56 F.3d 85, 92 n.10 (D.C.Cir.1995).

rights. In support of their argument, defendants point out that the Attorney General construes the Act to prohibit clinic employees and agents from expressing a pro-abortion viewpoint, or from attempting to counsel or educate patients, within the restricted areas at clinic entrances.[7] In February, 2003, the Office of the Attorney General communicated its interpretation of the Act, by letter, to the police departments of the four Massachusetts municipalities with reproductive health care facilities affected by the Act (i.e., Boston, Brookline, Worcester and Springfield).[8] These letters stated, in part, that "all persons in the restricted area, including clinic employees and **[340]** agents, are subject to the restrictions in Section 120E 1/2 (b) of the Act, including the restriction on oral protest, education, or counseling[,]" and that clinic employees and agents may not use the exemption to "express their views about abortion[.]"[9]

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[7] If consent is obtained, the Act permits any person, regardless of their message, to speak to patients within the restricted areas. Mass.Gen.L. ch. 266, § 120E 1/2 (b). Clinic employees and agents are, of course, authorized under the Act to insure the personal safety of the patients within the restricted areas.

[8] This Court had previously noted that even prior to February, 2003 that:

> The Attorney General's "interpretation" of the Act's employee and agent exemption has been articulated in a variety of ways. For example, the Attorney General's office has (1) sent written letters to law enforcement officials and abortion clinic personnel, (2) conducted explanatory PowerPoint presentations before members of the Boston and Brookline police departments, and (3) engaged in personal conversations with law enforcement and abortion clinic personnel. *McGuire, et al.*, 230 F. Supp. 2d at 193, n.8.

[9] Copies of these letters were also sent to the attorneys for each municipality's police department and to the assistant district attorneys responsible for prosecution under the Act in these areas—specifically, Suffolk, Norfolk, Worcester and Hampden Counties. Through these letters and other communications, the Attorney General's interpretation of the Act has been expressed to both law enforcement officials *and* the reproductive health care facilities at which the named plaintiffs engage in sidewalk counseling. Plaintiffs engage in counseling in Boston and Brookline.

Moreover, both the Boston and Brookline Police Departments have adopted the Attorney General's construction of the Act, thus rejecting the notion that the employee and agent exemption protects employees and agents who express their views on abortion to patients within the restricted areas. Both the Boston and Brookline Police have adopted an entirely evenhanded approach to enforcement of the Act, warning, when necessary, *both* pro-life protestors and clinic employee and agent escorts of potential violations of the Act and not to arrest anyone for violation of the Act without first issuing at least one warning. Both pro-life protesters and clinic escorts have received warnings by the Boston and Brookline Police.

Defendants point out that none of the plaintiffs has been arrested for violating the Act and that only one person (a pro-life protester) has been arrested for violating the Act, after repeated warnings from the Boston Police over a period of months. Accordingly, only one prosecution for violation of the Act has been commenced by the Suffolk County District Attorney, and there have been no prosecutions by the District Attorney of Norfolk County, or by the Attorney General.

In view of the foregoing, defendants argue there is no basis for plaintiffs' claim that the defendants have not applied the clinic employee and agent exemption in a content neutral manner. In addition, defendants assert that any complaint that the plaintiffs might raise concerning the conduct of clinic employees and agents, who are private parties, would not implicate "state action" and could not, for that reason, establish a constitutional violation. Moreover, none of the plaintiffs has complained to the police or to any other law enforcement authority about any oral protests, education or counseling being engaged in by employees and agents at clinic entrances.

In sum, the defendants claim that the Court should grant their renewed motion for summary judgment because they have fully adopted and are now applying the Attorney General's narrow, content-neutral interpretation of the em-

ployee and agent exemption requiring equal enforcement of the Act's prohibitions against all sides of the abortion debate, including clinic employees and agents. This was the interpretation endorsed by this Court in its earlier decision, *McGuire, et al.*, 230 F. Supp. 2d at 193. In addition, defendants argue that any as-applied claim that plaintiffs might premise on the acts of clinic employees and agents does not properly challenge "state action" and should, therefore, be dismissed.

Plaintiffs oppose Defendants' Renewed Motion for Summary Judgment. Plaintiffs have presented evidence that abortion clinic employees and agents have utilized the Act's exemption as a means of engaging in preferential pro-abortion advocacy within the restricted areas. To date, however, the State has neither arrested nor prosecuted any clinic employee or agent under **[*341]** the Act. Nevertheless, the plaintiffs make no argument to this Court that the police are not properly enforcing the Act as it has been construed by the Attorney General. The plaintiffs have introduced evidence regarding the speech conduct of clinic escorts *not* for the purpose of showing that the police are failing to enforce the Act as it has been construed by the Attorney General, but rather, to argue that the Act, by the fact of its very existence, allows and encourages exempted employees and agents to engage in pro-abortion counseling, yet prohibits the plaintiffs' anti-abortion protests within the restricted areas.

Plaintiffs appear to be reluctant, however, to acknowledge that circumstances have changed substantially since the Act was originally passed and the Court of Appeals issued its directive in McGuire regarding an as-applied challenge to the Act. Specifically, the Act has since been interpreted by the Attorney General so as to require evenhanded enforcement of its prohibitions, even against clinic employees and agents, and the Attorney General's interpretation

has been adopted by the law enforcement authorities.[10] The plaintiffs have failed to offer any legal authority to support a ruling that the Act is unconstitutional, as applied, in these changed circumstances.

Although the Court of Appeals indisputably declared "[t]he Act, on its face, [to be] content neutral," *McGuire, et al.*, 260 F.3d at 48, it is of course possible for even a content neutral time, place and manner restriction to be applied in such a manner as to stifle free expression by favoring or disfavoring speech based on its content. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002). If the state were to enforce the Buffer Zone Act by ignoring the speech activities of favored speakers (or by prosecuting, issuing warnings, or unduly beleaguering only disfavored speakers), such application of the Act would of course be unconstitutional and evidence thereof would augment plaintiffs' case considerably. *See id.* at 325, 122 S. Ct. 775. Plaintiffs have not produced such evidence.

Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether this burden is met, the Court must view the record in the light

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[10] The Court notes that, on its face, the Attorney General's interpretation, like the Act itself, appears to be content-neutral. In addition to the plain meaning of the Attorney General's words, as expressed in the letters sent to law enforcement (discussed *supra*), there is no evidence that the construction was adopted because of a disagreement with the message behind any speech activities. *See McGuire, et al.*, 260 F.3d at 43 (*quoting Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) ("the principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.")). Rather, the purpose behind the Attorney General's construction appears to be legitimate and unrelated to expressive content. *See id.* at 44.

most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *See e.g., Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000); *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995). For a case to be worthy of trial, then, there must be a *"genuine"* issue of *"material"* fact. In this context, a "genuine" issue is one "that a reasonable jury could resolve . . . in favor of the nonmoving party." **[*342]** *McCarthy*, 56 F.3d at 315. "Material" means that a contested fact has the potential to change the outcome of the suit under governing law if the dispute over it is resolved in favor of the nonmovant. *Id.* If the nonmoving party fails to show the existence of a genuine issue of material fact, summary judgment may be appropriate. *Id.*

In the instant case, plaintiffs have failed to show at there is a genuine factual dispute as to whether law enforcement officials are failing to enforce the employee and agent exemption in a manner consistent with the Attorney General's interpretation of the Act. The plaintiffs' evidence focuses almost exclusively on the conduct of clinic escorts, rather than on the conduct of law enforcement, and fails to raise the crucial material factual issue of whether the Act, as construed by the Attorney General, is not being evenhandedly enforced by the Boston and Brookline police.

The Attorney General's narrow interpretation of the employee and agent exemption appears to be a vigorous attempt to construe the Act in accordance with the Court of Appeals' opinion in *McGuire, et al.*, 260 F.3d 36, and to thereby provide a framework under which the exemption may be applied without violating the constitutional rights of the plaintiffs. This Court looks favorably upon the Attorney General's narrowing construction of the exemption, *see McGuire, et al.*, 230 F. Supp. 2d at 193, and gives said construction great weight when considering the as-applied constitutionality of the Act. *See New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 26 (1st Cir. 2002) (in context of First Amendment challenge to leafleting restrictions, the court "[gave] weight to [state] agency's narrowing

interpretation of its own regulations") (*citing City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 n.11, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988)) (declaring it proper for courts to "presume any narrowing construction or practice to which [a state] law is 'fairly susceptible.'"). Such deference is especially appropriate in instances such as the case at hand, where the record lacks evidence that the state law has been administered in an unfair or discriminatory fashion. *See Kinton*, 248 F.3d at 26.

Having determined that the Attorney General's interpretation of the Act should be given weight, the Court can identify no basis in the plaintiffs' evidence to find that the Act, as construed by the Attorney General, is being applied unconstitutionally. It is not proper for the plaintiffs to seek relief at this time, based on the mere possibility that the Act will not be applied evenhandedly in the future. The appropriate time for this Court to deal with the alleged as-applied unconstitutionality of the Act's employee and agent exemption would be when a pattern of unlawful favoritism, abuse, or infelicitous application of the Attorney General's construction actually emerges. *See Id.* (*citing Chicago Park Dist.*, 534 U.S. at 325, 122 S. Ct. 775). Even after an extended discovery period, however, plaintiffs have failed to produce evidence of such a pattern.

Defendants argue that the clinic escorts' (who are *private parties*) alleged violations of the Act and other general interferences with the plaintiffs' rights, cannot be a proper basis for a declaration that *state officials* have violated the Constitution. Defendants correctly point out that "the 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." **[*343]** *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976). In this case, no clinic escort is before the Court as a defendant. Any injury that results from the conduct of the escorts, then, may not properly be redressed by

this Court. Furthermore, a violation of the Fourteenth Amendment may result only from *state* action. *See Brentwood Acad. v. Tennessee Secondary Sch. Athletic Assn.*, 531 U.S. 288, 295, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001) ("Our cases try to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is not."). In order to properly ground their as-applied challenge in the actions of the clinic escorts, then, the plaintiffs must show how the actions of such private parties may be attributed to the *state*.

Only under certain circumstances may seemingly private behavior "be fairly treated as that of the State itself." *Id.* (*quoting Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974)). According to First Circuit precedent, "[t]he essential state action inquiry is whether the government has been sufficiently involved in the challenged actions that it can be deemed responsible for the plaintiff's claimed injury." *Yeo v. Town of Lexington*, 131 F.3d 241, 248 (1st Cir. 1997). Although the state action inquiry is "necessarily fact bound," *id.* at 249, the Supreme Court has recognized a number of factors that can bear on the fairness of attributing seemingly private actions to the state. *See Brentwood Acad.*, 531 U.S. at 296, 121 S. Ct. 924 (stating that a challenged activity may be "state action" when: (1) it results from the State's exercise of coercive power; (2) the State either overtly or covertly provides significant encouragement for said activity; or (3) a private actor operates as a willful participant in joint activity with the State or its agents) (quotations and citations omitted). Without any of these factors being present in this case the Court has no grounds upon which to attribute the actions of the private escorts to the State, and the plaintiffs' as-applied challenge to the constitutionality of the Act, therefore, may not be based upon these actions.

The Court rules that the Act is not unconstitutional as-applied to the circumstances in this case. The Attorney General has interpreted the Act's prohibition against oral protest, education, or counseling within the restricted areas

to apply evenhandedly to both clinic employees and agents and to anti-abortion protesters, and there is no genuine issue of fact that the Attorney General's construction is not being applied by the law enforcement authorities in the jurisdictions where the plaintiffs engage in sidewalk counseling. Defendants' Renewed Motion for Summary Judgment is, therefore, granted.

The subject of abortion raises the most awesome and profound legal, moral and biological questions relating to the origin, nature and destiny of human life: such ultimate issues as to when does life begin and who has the authority to terminate it and under what conditions, and more specifically, what constitutes a human person and does the "unborn person" have "certain unalienable Rights," and if so, can such rights be limited. For this reason the abortion debate will continue to provoke the clash of robust public discourse in our time.[11] Pro-life advocates are morally **[*344]** convinced that an unborn child is a living human person whose right to life should be secured by the protections of the United States Constitution. Pro-choice advocates are as convinced that the unborn child is not a living human person and that the unborn child's mother has the choice to terminate the life of her unborn child, even, in some instances, of a child partially born. No statute, as applied, should deny either view, pro-abortion or anti-abortion, in this vigorously contested

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[11] When issues are based on conscience and not on expediency, such as those involving life and death, war and peace, genocide, slavery or human rights, the clash of ideas never ceases to resound in the public square until a resolution is finally achieved. Such issues of conscience do not fade into silence over time due to public disinterest or apathy. Henry David Thoreau in his "Civil Disobedience," the manual for groups, such as Martin Luther King's, who wish to awaken the conscience of the people, exhorted his fellow citizens to peacefully confront laws deemed to be morally evil and "not resign (their) conscience to the legislator." Since the opposing views on the abortion issue are both rooted in deeply held beliefs, the debate will long continue. Those who oppose abortion believe that no one has the right to terminate innocent human life; those who support abortion believe that a woman has the right to choose to destroy the fetus within her body.

debate equal access to the public forum to exercise its freedom of expression.

Sound public policy depends on a fully informed citizenry in our representative form of government, and a fully informed citizenry is achieved by a free and equal expression of conflicting ideas. For although this case has been characterized by some as an "abortion" case, it is, in truth, a "free speech" case, and, it is the necessary condition of a healthy and vigorous body politic that there be a full and fair debate on all serious public issues, including the issue of abortion. The measure of the vitality of a democracy is the degree to which the government permits the voices of dissent to protest its laws and policies. Pro-life protesters who conscientiously believe that abortion remains a grave moral evil must be given as equal an opportunity as their pro-abortion opponents to express their sincere message of respect for the sanctity of innocent human life.[12]

For the reason that the abortion debate will continue to be vigorously waged, the granting of defendants' Motion for Summary Judgment does not foreclose the plaintiffs or other pro-life protesters from initiating a subsequent action against the defendants challenging the constitutionality of the Act, as applied, in a concrete factual setting should there be evidence that clinic employees and agents are in fact exercising their statutory right to protest, educate or counsel and that the Act's exemption for clinic employees and agents is not being enforced in accordance with the Attorney General's interpretation of the Act requiring evenhanded en-

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[12] The prohibition against the deliberate killing of innocent human life was a precept of universal moral law and is one of the biblical Ten Commandments of the Judeo-Christian religious tradition. In addition to the unborn child, others who have been accorded non-person status under the law were Blacks in the ante-bellum South suffering under the inhuman, but constitutional yoke of slavery and Jews in Hitler's Nazi Germany who were herded under deportation orders to the gassy fumes of the death camps. It is one of the glories of our nation's history that William Lloyd Garrison and the other Abolitionists were free to vigorously express their conviction that slavery was a grave moral wrong.

forcement of its prohibitions against all sides of the abortion debate, including clinic employees and agents, within the restricted areas. A subsequent action may also be commenced by plaintiffs or other pro-life protesters if the Attorney General's interpretation of the Act is changed so as not to require evenhanded enforcement of its prohibitions against both pro-life protesters and clinic employees and agents within the restricted areas.

In brief, for the Act to remain invulnerable to an as-applied constitutional challenge, the Attorney General's interpretation must remain unchanged and the law enforcement authorities must vigorously enforce such interpretation.

[*345] Defendants' Renewed Motion for Summary Judgment is granted.

SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MARY ANNE MCGUIRE, *et al.*,

Plaintiffs,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Defendants.

No. CIV.A. 00-12279-EFH

Oct. 22, 2002

[230 F. Supp. 2d 189]

MEMORANDUM AND ORDER

HARRINGTON, Senior District Judge.

This matter involves Defendants' Motion for Summary Judgment. At issue is the constitutionality, as applied, of the Massachusetts statute, Mass. Gen. L. ch. 266, Section 120E 1/2, that regulates speech-related **[*190]** conduct within eighteen feet of reproductive health care facilities. The specific section of the statute that is challenged imposes both criminal and civil penalties on persons who knowingly approach another person, within six feet of such person, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling," unless the targeted individual consents to such approach.[1] Exempted from the statute are "persons entering

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[1] Mass.Gen.L. ch. 266, Section 120E 1/2 (b). The statute reads in relevant part: "No person shall knowingly approach another person or occupied motor vehicle within six feet of such person or vehicle, unless such other person or occupant of the vehicle consents, for the purpose of

or leaving such facility" and "employees or agents of such facility acting within the scope of their employment."[2] The question is whether the First Amendment rights of the speaker are abridged by the protection the statute, as applied, provides for the unwilling listener.

Plaintiffs Mary Anne McGuire, Ruth Schiavone and Jean B. Zarrella are three private citizens who regularly travel to the sidewalks and public ways in front of and near reproductive health care facilities, attempting to dissuade women from having abortions by engaging in counseling activities, including distributing leaflets and engaging in oral conversations. Plaintiffs allege that their fear of criminal prosecution caused them to be chilled in their exercise of fundamental constitutional rights.

Plaintiffs filed a Complaint praying for a declaration that the Massachusetts statute is facially invalid and seeking an injunction against its enforcement. They alleged that Mass. Gen. L. ch. 266, Section 120E 1/2 is facially unconstitutional because it violates their right to freedom of speech under the First and Fourteenth Amendments to the United States Constitution. Specifically, plaintiffs claim three causes of action: (1) a violation of the First Amendment's

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passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of 18 feet from any entrance door or driveway to a reproductive health care facility or within the area within a rectangle not greater than six feet in width created by extending the outside boundaries of any entrance door or driveway to a reproductive health care facility at a right angle and in straight lines to the point where such lines intersect the sideline of the street in front of such entrance door or driveway." *Id.*

This specific section of the statute is ruled severable from the complete statute itself.

[2] *See* Section 120E 1/2 (b)(1-2). Also exempted are various law enforcement and emergency personnel, and persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility. Section 120E 1/2 (b)(3-4).

Freedom of Speech Clause; (2) a violation of the Equal Protection Clause of the Fourteenth Amendment; and (3) a violation of the Due Process Clause of the Fourteenth Amendment. The several named defendants are those state officers empowered to prosecute violators of the laws of the Commonwealth, and are represented by the Attorney General of the Commonwealth of Massachusetts.

The issue originally before this Court was whether, on its face, the statute is unconstitutional in any of the following four respects. First, whether the Act's explicit singling out of reproductive health care facilities indicates that it is a content-based regulation of speech. Second, whether the exemption for certain people, particularly employees and agents of the facilities, represents impermissible governmental protection for one side of the abortion debate, while abridging fundamental free speech rights of the other. Third, whether the process for physically marking the buffer zones amounts to a discriminatory activation provision. Fourth, **[*191]** whether the language of the statute, aimed primarily at oral communications, reveals that its true intent is the suppression of speech rather than any of the four stated purposes.[3]

This Court held the Act, Mass. Gen. L. ch. 266, Section 120E 1/2, facially unconstitutional because under the Act employees and agents of abortion clinics have the right to express their pro-abortion views within the restricted areas; whereas anti-abortion protestors are prohibited from ex-

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[3] Section 1 of S.B. No. 148 reads: "The purpose of this act is to:—(a) increase the public safety in and around reproductive health care facilities; (b) maintain the flow of traffic and prevent congestion around reproductive health care facilities; (c) enact reasonable time, place and manner restrictions to reconcile and protect both the first amendment rights of persons to express their views, assemble and pray near reproductive health care facilities and the rights of persons seeking access to such facilities to be free from hindrance, harassment, intimidation and harm; and (d) create an environment in and around reproductive health care facilities which is conductive to safe and effective medical services, including surgical procedures, for patients."

pressing their anti-abortion views within the same areas. *McGuire v. Reilly*, 122 F. Supp. 2d 97 (D. Mass. 2000).

The Court of Appeals for the First Circuit held the Act facially constitutional, although the Act accorded differential treatment to the statutory right to express two disparate views on the subject of abortion, on the ground that it promoted public safety, personal security, smooth traffic flow and effective medical services.

The Court of Appeals further ruled that there was no evidence that employees and agents had in fact exercised their statutory right to protest, educate or counsel.[4] *McGuire v. Reilly*, 260 F.3d 36 (1st Cir. 2001). The Court of Appeals stated that if employees and agents do in fact exercise their statutory right to engage in preferential pro-abortion advocacy *"the plaintiffs remain free to challenge the act, as applied, in a concrete factual setting."*[5] *Id.* at 47. (Emphasis supplied)

The plaintiffs contend that the Act is unconstitutional, as applied, on the ground that employees and agents of the abortion clinics do in fact *exercise* their statutory right to engage in preferential pro-abortion advocacy within the restricted areas.

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[4] This Court had previously found that employees and agents had in fact exercised their statutory right to protest, educate or counsel based on their financial and philosophical incentive to so do, their function as volunteer escorts "to help provide safe, unimpeded clinic access for women" (Exhibit 1), and common experience which teaches that a statutory right is ultimately exercised.

[5] In an "as-applied" challenge, a plaintiff "contends that application of [a] statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional," *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1012, 113 S. Ct. 633, 121 L. Ed. 2d 564 (1992) (Scalia, J., Rehnquist, C.J., and White, J., dissenting), *denying cert.* to 962 F.2d 1366 (9th Cir.1992), and asks only that the reviewing court declare the challenged statute unconstitutional on the facts of the particular case. *Sanjour v. Environmental Protection Agency*, 56 F.3d 85, 92 n.10 (D.C.Cir.1995).

The defendants have moved for summary judgment. Defendants' motion presents the argument that any as-applied constitutional challenge brought by the plaintiffs is unripe and must be rejected at this time. The thrust of their argument is that the State has not yet applied the Act to the plaintiffs in a way that violates the plaintiffs' constitutional rights.[6] Additionally, **[*192]** defendants contend that any mere anticipation plaintiffs may harbor that the Act will not, in the future, be evenhandedly enforced against pro-abortion speech within the restricted areas, is hypothetical in nature and insufficient to challenge the constitutionality of the Act as-applied. Finally, the defendants assert that "private conduct" cannot be attributed to the State in order to make out an action for violation of constitutional rights. Thus, argue defendants, any as-applied challenge plaintiffs might premise on the conduct of private parties, such as clinic employees or agents, does not allege the requisite "state action."

None of defendants' stated bases for opposing plaintiffs' as-applied constitutional challenge to the Act controls here. This Court must proceed in a manner consistent with the First Circuit's opinion in *McGuire*. *McGuire* directs that if clinic employees or agents exercise the right granted them under the Act's exemption to engage in preferential pro-abortion advocacy, plaintiffs are free to challenge the Act, as applied, in a concrete factual setting. The material issue is *not*, for example, that none of the plaintiffs has been arrested or prosecuted under the Act.[7] Rather, it is whether

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[6] Defendants specifically point out that none of the plaintiffs has been arrested or prosecuted under the Act; that the Attorney General's interpretation of the Act requires evenhanded enforcement of the Act's prohibitions against *all* sides of the abortion debate, including clinic employees and agents; and that such interpretation has been adopted by the Boston and Brookline police departments, both of which have made it their policy to arrest individuals only after issuing a warning to anyone engaging in particular conduct appearing to violate the Act.

[7] *See, e.g., Steffel v. Thompson*, 415 U.S. 452, 458-59, 475, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974) (proclaiming it unnecessary that petitioner first expose himself to arrest or prosecution before being entitled to chal-

the Act, as applied to a real and concrete factual setting, permits the expression of a pro-abortion viewpoint by clinic employees and agents, while simultaneously prohibiting plaintiffs from articulating an opposing, anti-abortion message within the same restricted areas.

Plaintiffs oppose defendants' motion for summary judgment. Plaintiffs argue that they need not be arrested or prosecuted in order to assert an as-applied constitutional challenge to the Act. Rather, plaintiffs assert that they have a reasonable fear of prosecution under the Act and have been chilled in exercising their First Amendment rights, thereby causing them to suffer present hardship and injury. Plaintiffs claim to face a dilemma between restraining their speech activities or going to jail. In addition, plaintiffs contend that the Attorney General's "interpretation" of the Act as requiring the Act's prohibitions to be enforced against *all* persons in the 18-foot restricted area, including clinic employees and agents, is contrary to the plain in language of

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lenge a statute he claims to deter exercise of his constitutional rights; and refusing to preclude issuance of federal declaratory relief where plaintiff brought as-applied challenge to constitutionality of state criminal statute that had not yet been enforced against plaintiff, but where a genuine threat of enforcement existed); *American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 221 F.3d 1211, 1214 (11th Cir. 2000) (overturning district court for improperly declining to hear as-applied pre-enforcement challenge, on grounds that plaintiffs who showed credible threat of prosecution should not be required to await and undergo criminal prosecution as sole means of seeking relief); *Rhode Island Ass'n of Realtors v. Whitehouse*, 199 F.3d 26, 30-31 (1st Cir. 1999) ("In a pre-enforcement challenge to a statute carrying criminal penalties, standing exists when 'the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution.'") (citations omitted); *Auburn Police Union v. Carpenter*, 8 F.3d 886, 902 n.23 (1st Cir. 1993) (noting that although another circuit declined to hear an as-applied pre-enforcement challenge, this Court preferred to consider parties' arguments on the merits rather than "embark upon technicalities").

the Act, is invalid, and not [*193] binding.[8] Finally, and most significantly, plaintiffs have presented evidence that abortion clinic employees or agents have utilized the Act's exemption as a means of engaging in preferential pro-abortion advocacy within the restricted areas. To date, the State has neither arrested nor prosecuted any clinic employee or agent under the Act.

Summary judgment is appropriate only when "the pleadings, depositions, answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether this burden is met, the Court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). For a case to be worthy of trial, then, there must be a "*genuine*" issue of "*material*" fact. In this context, a "genuine" issue is one "that a reasonable jury could resolve ... in favor of the nonmoving party." *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995). "Material" means that a contested fact has the potential to change the outcome of the suit under governing law if the dispute over it is resolved in favor of the nonmovant. *Id.* If the nonmoving party fails to show the existence of a genuine issue of material fact, summary judgment may be granted. *Id.*

Plaintiffs have met their burden by showing there is a genuine issue of material fact as to whether clinic employees or agents have engaged in oral protest, education or counsel-

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[8] The Attorney General's "interpretation" of the Act's employee and agent exemption has been articulated in a variety of ways. For example, the Attorney General's office has (1) sent written letters to law enforcement officials and abortion clinic personnel, (2) conducted explanatory PowerPoint presentations before members of the Boston and Brookline police departments, and (3) engaged in personal conversations with law enforcement and abortion clinic personnel.

ing on the public ways within the restricted areas in front of abortion clinics, and thereby have exercised the rights granted to them under the plain language of the Act's employee and agent exemption. The evidence supports the argument that said exemption is not being enforced in a manner consistent with the Attorney General's interpretation. This Court looks favorably upon the Attorney General's interpretation as an attempt to construe the Act's employee/agent exemption in accordance with the Court of Appeals' opinion in *McGuire*, and provide a framework under which said exemption may be applied without violating the constitutional rights of the plaintiffs.[9] Unfortunately, evidence that the Act is not being enforced consistent with the Attorney General's interpretation suggests a possible pattern of favoritism toward pro-abortion speech within the restricted areas.

Because there is a genuine issue of material fact, this Court will not deny plaintiffs a trial on the merits for an as-applied challenge to the constitutionality of the employee and agent exemption present in Mass. Gen. L. ch. 266, § 120E 1/2.[10] Defendants' **[*194]** motion for summary judgment as to the as-applied challenge to the Act's exemption is denied at this time.

Prior to setting a hearing on the merits to determine whether clinic employees and agents have engaged in oral protest, education or counseling within the restricted areas, the Court extends the discovery period for six months to afford the parties the opportunity to observe whether any

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[9] Clinic employees and agents are, of course, authorized under the Act to insure the personal safety of the patients within the restricted areas.

[10] Pursuant to the First Circuit's decision in *McGuire*, this Court shall not entertain any *facial* challenge to the Act's constitutionality. This Court must abide by the decision in *McGuire* that *on its face*, the Act, including its exemptions, is both content-neutral and viewpoint-neutral, and does not on its face violate the Constitution of the United States. The Defendants' Motion for Summary Judgment on the facial challenge is allowed.

such violations are frequent or sporadic and to determine whether the Act's exemption for clinic employees and agents is being applied in accordance with the Attorney General's interpretation.[11]

The subject of abortion raises the most awesome and profound legal and moral questions: when does life begin and who has the authority to terminate it and under what conditions, and more specifically, do the "unborn" have "certain unalienable Rights," and if so, can such rights be limited. For this reason the abortion debate will continue to provoke the clash of robust public discourse in our time.[12] No statute, as applied, should deny either view, pro-abortion or anti-abortion, in this vigorously contested debate equal access to the public forum to exercise its freedom of expression. As Justice Holmes wrote in *Abrams v. United States*, 250 U.S. 616, 630, 40 S. Ct. 17, 63 L. Ed. 1173 (1919),

> [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market.... That at any rate is the theory of our Constitution.

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[11] During the extended discovery period the Attorney General might exercise his authority to render a policy directive *formally* promulgating his interpretation of the Act.

[12] When issues are based on conscience and not on expediency, such as those involving life and death, war and peace, genocide, slavery or human rights, the clash of ideas never ceases to resound in the public square until a resolution is finally achieved. Such issues of conscience do not fade into silence over time due to public disinterest or apathy. Henry David Thoreau in his "Civil Disobedience," the manual for groups, such as Martin Luther King's, who wish to awaken the conscience of the people, exhorted his fellow citizens to peacefully confront laws deemed to be morally evil and "not resign (their) conscience to the legislator." Since the opposing views on the abortion issue are both rooted in deeply held beliefs, the debate will long continue. Those who oppose abortion believe that no one has the right to terminate innocent human life; those who support abortion believe that a woman has the right to choose to destroy the fetus within her body.

Sound public policy depends on a fully informed citizenry in our representative form of government, and a fully informed citizenry is achieved by a free and equal expression of conflicting ideas. For although this case has been characterized by some as an "abortion" case, it is, in truth, a "free speech" case, and, it is the necessary condition of a healthy and vigorous body politic that there be a full and fair debate on all serious public issues, including the issue of abortion.

Defendants' Motion for Summary judgment as to the as-applied constitutionality challenge to the Act's exemption is denied at this time and the discovery period is extended for a period of six months, and, at the close of which, the Court shall entertain a renewed Motion for Summary Judgment to be filed by defendants on or before May 14, 2003.

SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

MARY ANNE MCGUIRE, *et al.*,
Plaintiffs, Appellees,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,
Defendants, Appellants.

No. 00-2492

Heard March 7, 2001
Decided Aug. 13, 2001

[260 F.3d 36]

Before SELYA, Circuit Judge, COFFIN, Senior Circuit Judge, and LYNCH, Circuit Judge.

SELYA, Circuit Judge.

This appeal—in which we have the benefit of exemplary briefing by the parties and the various amici—requires us to reconcile a triad of state interests (protecting public health, maintaining public safety, and preserving access to medical facilities) with the First Amendment interests of those who challenge restrictions on how they may debate issues of public concern. We act in the context of a Massachusetts statute, Mass. Gen. Laws ch. 266, § 120E 1/2 (the Act), which creates a floating six-foot buffer zone around pedestrians and motor vehicles as they approach reproductive health care facilities (RHCFs). We view [*39] that statute through the prism of *Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480 147 L. Ed. 2d 597 (2000), in which the United States Supreme Court upheld an analogous statute despite the fact that it incidentally restricted some speech.

The district court found meaningful distinctions between the Act and the Colorado statute at issue in *Hill*, determined that these distinctions undermined the constitutionality of the Act, and preliminarily enjoined the Act's enforcement. *See McGuire v. Reilly*, 122 F. Supp. 2d 97, 101-03 (D. Mass. 2000). But the distinctions noted by the district court do not make a dispositive difference. *Hill* controls, and the Act, on its face, lawfully regulates the time, place, and manner of speech without discriminating based on content or viewpoint. Accordingly, we reverse the district court's ukase.

I. BACKGROUND

In order to frame the issues on appeal, we think it is useful to trace the developments leading to the Act's passage, survey its text, and place it in the context suggested by the *Hill* Court's decision. With that foundation in place, we then recount the proceedings below.

A. The Act's History.

By the late 1990s, Massachusetts had experienced repeated incidents of violence and aggressive behavior outside RHCFs. Concerned legislators responded to these disturbances by introducing Senate Bill No. 148, *see* S.B. 148, 181st Gen. Ct., Reg. Sess. (Mass. Jan. 6, 1999), reprinted in Appendix B hereto. The bill purposed to create a fixed twenty-five foot buffer zone from RHCFs' entrances, exits, and driveways, and with limited exceptions, to prohibit all persons from entering, or remaining within, that buffer zone regardless of the person's intent or the willingness of others to listen. The state senate held a hearing in April of 1999. The received testimony chronicled the harassment and intimidation that typically occurred outside RHCFs. In addition, numerous witnesses addressed the emotional and physical vulnerability of women seeking to avail themselves of abortion services, and gave accounts of the deleterious effects of overly aggressive demonstrations on patients and providers alike. Based in part on this testimony, the senate concluded that existing laws did not adequately protect pub-

lic safety in areas surrounding RHCFs. To remedy this situation, the senate favored the creation of fixed buffer zones. The sponsors of the bill left no doubt that they intended the proposed law to "increase public safety in and around [RHCFs]" while "maintain[ing] the flow of traffic and prevent[ing] congestion" there. S.B. 148, *supra*, § 1. In the bargain, the sponsors expected the law to provide "reasonable time, place and manner restrictions to reconcile and protect both the First Amendment rights of persons to express their views near reproductive health care facilities and the rights of persons seeking access to those facilities to be free from hindrance, harassment, intimidation and harm." It thereby would "create an environment in and around reproductive health care facilities which is conducive towards the provision of safe and effective medical services . . . to its patients." *Id.*

Skeptics worried that the proposed law might offend the Constitution. To stave off these gloom-and-doom predictions, the senate, on November 3, 1999, asked the Massachusetts Supreme Judicial Court (SJC) for an advisory opinion on the bill's constitutionality. On January 24, 2000, the SJC concluded that the Constitution presented no obstacle to enactment. *Opinion of the Justices to the Senate*, 430 Mass. 1205, 1211-12, 723 N.E.2d 1 (2000). **[*40]** The SJC advised that the bill, as framed, was unrelated to the content of protected expression. *Id.* at 1209, 723 N.E.2d 1. Moreover, the restrictions imposed had a rational basis in view of the heightened governmental interest that arises when "advocates of both sides of one of the nation's most divisive issues frequently meet within close proximity of each other in the areas immediately surrounding the State's clinics, in what can and often do become congested areas charged with anger." *Id.* at 1210, 723 N.E.2d 1.

After receiving this favorable review, the senate engrossed Senate Bill No. 148 on February 29, 2000. That version of the law never came to a vote in the house of representatives, mainly because the United States Supreme Court decided *Hill* on June 28, 2000. In that opinion, the

Court upheld, as a content-neutral time, place, and manner restriction, a Colorado statute designed to ameliorate the same evils. 530 U.S. at 719-21, 120 S. Ct. 2480. The Court's conclusion rested on three pillars:

> First, [the statute] is not a regulation of speech. Rather, it is a regulation of the places where some speech may occur. Second, it was not adopted because of disagreement with the message it conveys.... Third, the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech.

Id. at 719-20, 120 S. Ct. 2480 (internal quotation marks omitted).

Massachusetts decided to follow the trail that Colorado had blazed. Consequently, the house of representatives struck the text of Senate Bill No. 148 and reformulated its language. The amended version—ultimately enacted and codified as section 120E 1/2—recast the proposed statute and, most notably, replaced the fixed buffer zones originally envisioned by the state senate with floating buffer zones of the type upheld in *Hill*. The house engrossed the bill on July 28, 2000, and the senate concurred the next day. On August 10, 2000, Governor Cellucci signed the Act into law.

B. The Act's Text.

The Act, formally known as the Massachusetts Reproductive Health Care Facilities Act, is reprinted in Appendix A hereto. The Act makes it unlawful, absent consent, "knowingly to approach [within six feet of a person or occupied motor vehicle] for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of 18 feet from any entrance door or driveway to a reproductive health care facility." Mass. Gen. Laws ch. 266, § 120E 1/2 (b).

The statutory prohibition is not absolute. In the first place, the architecture of this floating buffer zone precludes

speakers from *approaching* unconsenting listeners, but it neither prevents speakers from holding their ground nor requires them to retreat from passersby. In the second place, the Act's prophylaxis does not attach unless and until an RHCF opens for business and clearly demarcates the protected eighteen-foot zone. *Id.* § 120E 1/2 (c). Finally, the Act exempts persons entering or leaving an RHCF; persons using the streets to reach a destination other than the RHCF; and, while acting within the scope of their employment, (i) the RHCF's employees and agents, and (ii) certain government officials (e.g., police officers). *Id.* § 120E 1/2 (b).

C. The Influence of Hill.

In rejecting a challenge to a similar Colorado statute, the *Hill* Court made a number of pronouncements that inform **[*41]** our resolution of this appeal. Perhaps most important, the Court held that the Colorado law was content-neutral even though it singled out "oral protest, education, [and] counseling," because this denoted a broad category of speech rather than specifying a particular subject matter or viewpoint. 530 U.S. at 720, 120 S. Ct. 2480. In reaching this conclusion, the Court gave short shrift to the argument that, by targeting health care facilities, the Colorado statute impermissibly discriminated against abortion protesters. *Id.* at 724, 120 S. Ct. 2480.

Three other points deserve mention. First, the Court emphasized the significance of the state's interest in preserving access to health care facilities. *Id.* at 715, 120 S. Ct. 2480. Second, the Court noted that the Colorado legislature had tailored the law narrowly to serve this end. *Id.* at 728-29, 120 S. Ct. 2480. Third, the Court determined that a floating buffer zone of modest proportions left ample alternative channels for communication. *Id.* at 723, 120 S. Ct. 2480.

Hill bears on this case in another way as well. Although the Act was conceived in the albedo of *Hill*, it is not a carbon copy of the statute at issue there. There are five key differences:

- The protections of the Colorado law apply to all health care facilities, Colo. Rev. Stat. § 18-9-122, whereas the Act applies only to free-standing clinics that provide abortions, Mass. Gen. Laws ch. 266, § 120E 1/2.
- The Colorado statute specifies an 100-foot radius around all covered facilities, Colo. Rev. Stat. § 18-9-122(3), whereas the Act specifies an eighteen-foot radius, Mass. Gen. Laws ch. 266, § 120E 1/2 (b).
- The Colorado statute pretermits unwanted approaches within eight feet of anyone inside the specified area, Colo. Rev. Stat. § 18-9-122(3), while the Act constructs only a six-foot buffer zone, Mass. Gen. Laws ch. 266, § 120E 1/2 (b).
- The directive that the Act apply only when an RHCF is open for business and has clearly demarcated the protected area, Mass. Gen. Laws ch. 266, § 120E 1/2 (c), is not part of the Colorado scheme.
- The Act, unlike the Colorado law, exempts various groups of persons from its reach. *Id.* § 120E 1/2 (b).

In most of these respects, the Act arguably restricts less speech than its Colorado counterpart.

D. Proceedings Below.

The plaintiffs—Mary Anne McGuire, Ruth Schiavone, and Jean B. Zarrella—are Massachusetts residents who regularly protest, demonstrate, and provide sidewalk counseling outside RHCFs. Shortly after the passage of the Act, they sued a number of state hierarchs in the United States District Court for the District of Massachusetts. They argued that the Act violated their rights to freedom of speech, freedom of association, equal protection, and due process of law. To remedy these deprivations, they sought both a declaration of the Act's unconstitutionality and an injunction against its enforcement.

The district court determined that the Act offended the First Amendment in two ways. First, the court regarded

the Act as an impermissible content-based restriction because it "pertain[s] exclusively to speech that communicates a message of protest, education, or counseling spoken at the entrances of abortion clinics." *McGuire*, 122 F. Supp. 2d at 102. Second, the court determined that the Act discriminated on the basis of viewpoint. *Id.* at 103. The court reasoned Act's exemption of agents and employees of [*42] RHCFs gives rise to this infirmity because, by of their "personal relationship with the abortion clinic, [employees] have a strong financial interest or philosophic incentive to counsel the listener to undergo an abortion and they constitute very zealous advocates for this controversial procedure." *Id.* For these reasons, the court concluded that the plaintiffs had shown a substantial likelihood of success on the merits and enjoined the defendants from enforcing the Act pending a trial. *Id.* at 104.

This interlocutory appeal ensued. On motion duly filed, *see* Fed. R. App. P. 8(a), we stayed the injunction pending appeal. We now reverse.

II. THE PRELIMINARY INJUNCTION STANDARD

A party who seeks a preliminary injunction must show: (1) that she has a substantial likelihood of success on the merits; (2) that she faces a significant potential for irreparable harm in the absence of immediate relief; (3) that the ebb and flow of possible hardships are in favorable juxtaposition (i.e., that the issuance of an injunction will not impose more of a burden on the nonmovant than its absence will impose on the movant); and (4) that the granting of prompt injunctive relief will promote (or, at least, not denigrate) the public interest. *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996); *Narragansett Ind. Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir. 1991). Appellate review of rulings granting or denying preliminary injunctions is quite deferential. The court of appeals will set aside such a ruling only if it is persuaded that the lower court mistook the law, clearly erred in its factual assessments, or otherwise abused its discretion in granting the interim relief. *Ross-Simons*, 102 F.3d at 15, *Narragansett Ind. Tribe*, 934 F.2d at 5.

III. THE FIRST AMENDMENT CHALLENGE

To place the appellants' First Amendment challenge into workable perspective, we begin with an overview of the constitutional doctrine governing restrictions on speech. We then consider whether the Act qualifies as content-neutral legislation for First Amendment purposes. After answering this question, we then subject the Act to the appropriate level of judicial scrutiny. Throughout, we bear in mind that the plaintiffs have mounted a facial challenge to the Act as a whole, not an as-applied challenge to some particular application of it.

A. The Doctrinal Underpinnings.

Freedom of speech "is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327, 58 S. Ct. 149, 82 L. Ed. 288 (1937) (Cardozo, J.). Notwithstanding its exalted position in the pantheon of fundamental freedoms, free speech always must be balanced against the state's responsibility to preserve and protect other important rights. This balance may be weighted differently, however, depending upon the nature of the restriction that the government seeks to foster. We elaborate below.

Governmental restrictions on the content of particular speech pose a high risk that the sovereign is, in reality, seeking to stifle unwelcome ideas rather than to achieve legitimate regulatory objectives. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). As a general rule, therefore, the government cannot inhibit, suppress, or impose differential content-based burdens on speech. *Id.* at 641-42, 114 S. Ct. 2445. **[*43]** To provide maximum assurance that the government will not throw its weight on the scales of free expression, thereby "manipulat[ing] ... public debate through coercion rather than persuasion," *id.* at 641, 114 S. Ct. 2445, courts presume content-based regulations to be unconstitutional. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992); *Nat'l Amusements, Inc. v. Town of Dedham*,

43 F.3d 731, 736 (1st Cir. 1995). While courts theoretically will uphold such a regulation if it is absolutely necessary to serve a compelling state interest and is narrowly tailored to the achievement of that end, *see, e.g.*, *Boos v. Barry*, 485 U.S. 312, 321-29, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-32, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987), such regulations rarely survive constitutional scrutiny.

Courts grow even more chary when the government attempts to differentiate between disparate views espoused by those speaking on a singular subject. That chariness—some might say hostility—is not surprising, for viewpoint-based discrimination is a particularly offensive type of content-based discrimination. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995).

Judicial review takes on a different cast when a statute does not regulate speech per se, but, rather, restricts the time, place, and manner in which expression may occur. Such laws are less threatening to freedom of speech because they tend to burden speech only incidentally, that is, for reasons unrelated to the speech's content or the speaker's viewpoint. Where that description applies, courts employ a less exacting level of scrutiny, upholding limitations on the time, place, and manner of protected expression as long as "they are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984). This less taxing level of analysis—commonly called "intermediate scrutiny"—makes sense because the very fact of content neutrality offers a meaningful assurance that the government is not striving in a clandestine manner to steer public discourse or brainwash its citizens. *Turner Broad. Sys.*, 512 U.S. at 642, 114 S. Ct. 2445. We start, then, by analyzing whether the Act is content-neutral.

B. Classifying the Act.

The Supreme Court has explained that "the principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). Thus, a law designed to serve purposes unrelated to the content of protected speech is deemed content-neutral even if, incidentally, it has an adverse effect on certain messages while leaving others untouched. *See Hill*, 530 U.S. at 736, 120 S. Ct. 2480; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986).

By addressing political speech on public streets and sidewalks, the Act plainly operates at the core of the First Amendment. *See Hague v. CIO*, 307 U.S. 496, 515, 59 S. Ct. 954, 83 L. Ed. 1423 (1939) (noting that public streets and sidewalks are traditional public fora which "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and **[*44]** discussing public questions"). First Amendment interests nonetheless must be harmonized with the state's need to exercise its traditional police powers. *Hill*, 530 U.S. at 714-15, 120 S. Ct. 2480. The district court resolved this balance against the appellants. It opined that the state legislature enacted section 120E 1/2 because it disagreed with both the content of, and the viewpoint inherent in, anti-abortion protests. *See McGuire*, 122 F. Supp. 2d at 102-03. The court thus concluded that the Act, on its face, discriminates against abortion-related speech, *id.* at 102, and that the employee exemption compounds this evil by facilitating the airing of pro-choice sentiments while simultaneously restricting the expressive activities of pro-life partisans, *id.* at 103. We do not agree.

In holding that the Act constitutes invidious content-based discrimination against abortion-related speech, the lower court emphasized that "the Massachusetts statute applies exclusively to speech communicated at abortion clinics

and not . . . *to all health care facilities.*" *Id.* at 102. We believe that the court, in reaching this conclusion, misconstrued applicable First Amendment doctrine by focusing exclusively on the effects of the Act rather than on its underlying purpose.

The critical question in determining content neutrality is not whether certain speakers are disproportionately burdened, but, rather, whether the reason for the differential treatment is—or is not—content-based. *See Hill*, 530 U.S. at 719, 120 S. Ct. 2480 (positing that a statute is content-neutral when it does not directly regulate speech, has its origins in a legislative purpose unrelated to disagreement with the underlying message of particular speech, and advances interests unconnected to expressive content). As long as a regulation serves a legitimate purpose unrelated to expressive content, it is deemed content-neutral even if it has an incidental effect on some speakers and not others. *Ward*, 491 U.S. at 791, 109 S. Ct. 2746; *Nat'l Amusements*, 43 F.3d at 740. In that event, all that remains is for the government to show that accomplishment of the legitimate purpose that prompted the law also rationally explains its differential impact. *See City of Renton*, 475 U.S. at 47-48, 106 S. Ct. 925; *Nat'l Amusements*, 43 F.3d at 738.

We conclude, without much question, that the Act's stated goals justify its specific application to RHCFs. The Massachusetts legislature, confronted with an apparently serious public safety problem, investigated the matter thoroughly. That investigation yielded solid evidence that abortion protesters are particularly aggressive and patients particularly vulnerable as they enter or leave RHCFs. Thus, targeting these sites furthers conventional objectives of the state's police power—promoting public health, preserving personal security, and affording safe access to medical services. Although the Act clearly affects anti-abortion protesters more than other groups, there is no principled basis for assuming that this differential treatment results from a fundamental disagreement with the content of their expression. Rather, the finding required on these facts is that the

legislature was making every effort to restrict as little speech as possible while combating the deleterious secondary effects of anti-abortion protests. Just as targeting medical centers did not render Colorado's counterpart statute content-based, *Hill*, 530 U.S. at 722-23, 120 S. Ct. 2480, so too the Act's targeting of RHCFs fails to undermine its status as a content-neutral regulation.[1]

[*45] To be sure, the plaintiffs insist that the state's professed concerns about public safety, personal security, and access to medical facilities are mere pretexts for its desire to censor anti-abortion speech. This insistence gets them nowhere. For one thing, their insinuations are unsupported by any record evidence. For another thing, where differential treatment is justified, on an objective basis, by the government's content-neutral effort to combat secondary effects, it is insufficient that a regulation may have been adopted in direct response to the negative impact of a particular form of speech. *See Hill*, 530 U.S. at 723, 120 S. Ct. 2480; *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 762-64, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994); *see also Nat'l Amusements*, 43 F.3d at 740 ("Secondary effects can com-

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[1] The plaintiffs see this targeting as a smoking gun. In this regard, they cite *Carey v. Brown*, 447 U.S. 455, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980), and *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972), for the proposition that singling out a certain form of protest is tantamount to content-based discrimination. These authorities are unhelpful. In *Carey*, the Court struck down a statute that prohibited residential protests other than peaceful labor picketing. 447 U.S. at 471, 100 S. Ct. 2286. In *Mosley*, the Court overturned a statute that prohibited all protests except labor picketing near a school. 408 U.S. at 101-02, 92 S. Ct. 2286. In each instance, the Court declared the statute unconstitutional because the legislative purpose—protecting residential privacy and preserving safe access to schools, respectively—could not logically account for the special treatment accorded to labor protests. Here, however, as in *Hill* 530 U.S. at 724, 120 S. Ct. 2480, the targeting is closely confined to the legitimate legislative purpose that underlies the Act: combating violence at RHCFs. *See also City of Renton*, 475 U.S. at 47, 106 S. Ct. 925 (upholding a zoning ordinance that sought to prevent crime, protect residential neighborhoods, and maintain property values by singling out adult theaters).

prise a special characteristic of a particular speaker or group of speakers."). This is such a case: considered as a whole, the Act provides a neutral justification—unrelated to the content of speech—for differential treatment.

In an effort to parry this thrust, the plaintiffs point conspicuously to the district court's holding that the statutory exemption for clinic agents and employees constitutes impermissible viewpoint-based discrimination (and, therefore, taints the entire Act). The court premised this holding on its determination that, by allowing clinic employees to enter the floating buffer zone without constraint, the Act permits free-ranging expression of pro-choice views while suppressing pro-life messages. *McGuire*, 122 F. Supp. 2d at 103-04. Because this determination rests on an unsubstantiated factual foundation, we reject it.

A court's findings of fact must be anchored in probative evidence. *See United States v. Frankhauser*, 80 F.3d 641, 654-55 (1st Cir. 1996); *Blohm v. Commissioner*, 994 F.2d 1542, 1548 (11th Cir. 1993); *United States v. Williams*, 891 F.2d 962, 964-67 (1st Cir. 1989). This bedrock principle applies to findings made on a motion for a preliminary injunction. *See, e.g., Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993). Here, however, the district court lumped together all agents and employees of RHCFs and characterized them, without a shred of record support, as "very zealous advocates for this controversial procedure [abortion]." *McGuire*, 122 F. Supp. 2d at 103. The court then stated, again without any evidentiary predicate, that these "[e]mployees and agents of abortion clinics escort potential abortion clinic clients and counsel and exhort them to undergo an abortion within the restricted areas." *Id.* at 103 n.9. These findings are wholly unsupported and, hence, clearly erroneous. A judge's intuition cannot take the place of proof. *See United States v. Ortiz*, 966 F.2d 707, 717 (1st Cir. 1992) (holding that decisions must be based on **[*46]** more than the judge's hunch, unsupported by facts); *cf. Tuf Racing Prods., Inc. v. Am. Suzuki Motor Corp.*, 223 F.3d 585, 590 (7th Cir.

2000) (noting that judges must reason from facts rather than settling for guesswork).

There is, moreover, another defect in the district court's treatment of the employee exemption. The court ignored the matter of secondary effects as they bear on that exemption. This was an unfortunate oversight: the secondary effects that the Act was designed to ameliorate include securing public safety in and around RHCFs, preventing traffic congestion, and balancing free speech with the need to maintain a salutary atmosphere for those seeking access to medical services. *See* S.B. 148, *supra*, § 1. There is no evidence that agents and employees of RHCFs cause these problems.[2] Thus, excluding those individuals does not undermine the legitimacy of the Act as a vehicle to curb the secondary effects of particular conduct and thereby achieve the legislature's announced purposes.

The legislative history bears witness to this conclusion. Testimony taken before the state senate indicates beyond cavil that the employee exemption will promote the Act's goals because clinic employees often assist in protecting patients and ensuring their safe passage as they approach RHCFs. Indeed, the record contains numerous accounts of incidents in which clinic personnel had to approach patients to protect them from protesters and, sometimes, to prevent physical altercations. Since it is within the scope of their employment for clinic personnel to escort patients in this fashion, and since a primary purpose of the law is to facilitate safe access, the employee exemption serves the basic objectives of the Act. To cinch matters, the legislature rationally could have concluded that clinic employees are less likely to engage in directing of unwanted speech toward captive listeners—a datum that the *Hill* Court recognized as

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[2] To be sure, the record does show that, on occasion, a clinic employee has gotten into an altercation with an anti-abortion protester. But this sort of disturbance presumably would be stemmed by the exemption because the exemption tends to keep clinic employees and abortion protesters apart.

justifying the statute there. *See Hill*, 530 U.S. at 715-17, 120 S. Ct. 2480.

Endeavoring to counter these points, the plaintiffs posit that the employee exemption could not possibly have been designed to combat those undesirable secondary effects because the Act, without the exemption, permits any person to approach a non-consenting patient for purposes other than education, protest, and counseling. *See* Mass. Gen. Laws ch. 266, § 120E 1/2 (b). The exemption only has meaning, therefore, insofar as it allows those who work for RHCFs to approach within six feet of non-consenting patients to engage in such activities (i.e., education, protest, and counseling). From this plateau, the plaintiffs suggest that if a clinic employee were to approach to educate or counsel a prospective patient, that education or counseling doubtless would manifest a pro-choice viewpoint. So viewed, the sole practical purpose of the employee exemption is to promote a particular side of the abortion debate—a feature that renders the exemption discriminatory and ensures that any application would violate the First Amendment.

While this argument has a certain logic, it ultimately fails. After all, the plaintiffs have challenged the Act *on its face*. The nature of this challenge raises the bar for their success: a party who mounts a facial challenge to a statute must carry a significantly heavier burden than one who seeks [*47] merely to sidetrack a particular application of the law. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998); *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 76 (1st Cir. 2001); *Watchtower Bible & Tract Soc'y, Inc. v. Vill. of Stratton*, 240 F.3d 553, 562 (6th Cir.), *petition for cert. filed*, 69 U.S.L.W. 3750 (U.S. May 18, 2001) (No. 00-1737).

In the First Amendment context, this means that a plaintiff who challenges a statute on its face ordinarily must show either that the law admits of no valid application or that, even if one or more valid application exists, the law's reach nevertheless is so elongated that it threatens to inhibit

constitutionally protected speech. *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 967 (D.C. Cir. 1996). The plaintiffs do not challenge the employee exemption on the ground that it sweeps too broadly. Thus, they must show that the exemption admits of *no* constitutionally permissible application. This is an uphill climb, requiring the legal equivalent of an alpenstock and carabiners—and the plaintiffs are unable to scale the heights.

Courts owe legislative judgments substantial respect and, as a general matter, should be reluctant "to reduce statutory language to a merely illustrative function." *Mass. Assn of HMO v. Ruthardt*, 194 F.3d 176, 181 (1st Cir. 1999). The Massachusetts legislature may or may not have intended the employee exemption to serve the purpose envisioned by the plaintiffs. There are other likely explanations. For example, the legislature may have exempted clinic workers—just as it exempted police officers—in order to make crystal clear what already was implicit in the Act: that those who work to secure peaceful access to RHCFs need not fear prosecution. *See id.* (explaining that a legislative body "may consider a specific point important or uncertain enough to justify a modicum of redundancy").

The ultimate difficulty, of course, is that the legislature's subjective intent is both unknown and unknowable. At this juncture, we can look only to the purposes that may rationally be said to be served by the provision in question (here, the employee exemption). That is a large part of the reason why one who challenges a statute on its face must carry an appreciably heavier burden: a facial challenge, unlike an as-applied challenge, does not allow a reviewing court to base its judgments on actual experience or provide the court any room to capture nuances in a statute's meaning. *See United States v. Raines*, 362 U.S. 17, 20-22, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1330-35 (2000).

That ends this aspect of the argument. Because we can envision at least one legitimate reason for including the em-

ployee exemption in the Act, it would be premature to declare the Act unconstitutional for all purposes and in all applications. *See United States v. Hilton*, 167 F.3d 61, 71 (1st Cir.) (noting that "[i]t makes little sense to strike down an entire statute in response to a facial attack when potential difficulties can be remedied in future cases through fact-specific as-applied challenges"), *cert. denied*, 528 U.S. 844, 120 S. Ct. 115, 145 L. Ed. 2d 98 (1999). If, as the plaintiffs predict, experience shows that clinic staffers in fact are utilizing the exemption as a means either of proselytizing or of engaging in preferential pro-choice advocacy, the plaintiffs remain free to challenge the Act, as applied, in a concrete factual setting. *See Pharm. Research & Mfrs.*, 249 F.3d at 78 (rejecting facial challenge to state statute without prejudice to plaintiff's right to launch an [*48] as-applied challenge after implementation of the statute).

We recapitulate. The Act, on its face, is content-neutral. Furthermore, although courts correctly regard viewpoint discrimination as a particularly pernicious form of content discrimination, the Act does not discriminate against speakers based on their views. The employee exemption too is neutral on its face, drawing no distinction between different ideologies. And to the extent (if at all) that the exemption contributes to the Act's disproportionate impact on anti-abortion protesters, it can be justified by reference to the state's neutral legislative goals. We conclude, therefore, that since neither the Act as a whole nor the employee exemption reflects an impermissible bias against either the content of certain speech or the views of certain speakers, the Act's constitutionality must be determined by reference to the intermediate level of scrutiny that attaches to content-neutral time, place, and manner restrictions.

C. Intermediate Scrutiny.

Under the intermediate scrutiny standard, a law is deemed constitutional if it is narrowly tailored to serve significant state interests while leaving open ample alternative channels of communication. *See Renton*, 475 U.S. at 50, 106

S. Ct. 925; *Clark*, 468 U.S. at 293, 104 S. Ct. 3065. The Act passes this test.

The state legislature ascribed four purposes to the Act:[3] to increase public safety in and around RHCFs; to ensure smooth traffic flow; to balance free speech with the rights of persons seeking access to RHCFs to be free from hindrance; and to create an environment conducive to safe and effective medical services. S.B. 148, *supra*, § 1. The interests that underlie these purposes are firmly rooted in the state's traditional police powers, and these are precisely the sort of interests that justify some incidental burdening of First Amendment rights. *See Hill*, 530 U.S. at 715, 120 S. Ct. 2480 (noting the "enduring importance of the right to be free from persistent importunity, following and dogging after an offer to communicate has been declined") (citation and internal quotation marks omitted); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 376, 117 S. Ct. 855, 137 L. Ed. 2d 1 (1997) (extolling the significance of "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services"); *see also Madsen*, 512 U.S. at 772-73, 114 S. Ct. 2516 ("The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.").

On the flip side of the coin, the Act is narrowly tailored and leaves open sufficient opportunity to communicate in other ways. A law is narrowly tailored if it promotes a substantial governmental interest that would be less effectively achieved without the law and does so without burdening substantially more speech than is necessary to further this

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[3] Although the state senate wrote this list of purposes as a preamble to Senate Bill No. 148, there is nothing in the subsequent legislative history to suggest that the purposes changed after the senate bill was amended in the house of representatives to produce the final version. We therefore follow the parties' lead and assume that this litany applies to the Act.

goal. *Ward*, 491 U.S. at 799, 109 S. Ct. 2746. The plaintiffs argue that Massachusetts previously had enacted a number of general protections designed to combat the same evils as the Act, e.g., Mass Gen. Laws ch. 266 § 20E (knowingly obstructing entry to health **[*49]** care facility); *id.* ch. 272 § 53 (disturbing the peace); *id.* ch. 12 § 11H (impairing civil rights); *id.* 265 § 13A (assault and battery), and that these non-speech-restricting protections have not been enforced in the context of abortion protests. They claim, moreover, that the only behavior targeted by the Act that is not already covered by other laws is non-threatening speech, and that the Commonwealth has offered no content-neutral justifications for limiting such peaceful discourse.

This argument is unconvincing. The Massachusetts legislature reasonably concluded that existing law inadequately addressed the public safety, personal security, traffic, and health care concerns created by persistent demonstrations outside RHCFs. Indeed, the state senate specifically found that existing statutory protections did not suffice—and this finding is plausible given the general terms used by those statutes (e.g., "obstruction," "disturbing the peace"). While such wider nets might catch the big fish, there is every reason to believe that they would let the fingerlings through. We have said enough on this subject. The short of it is that the legislature weighed the *Hill* Court's conclusions and formulated a bill to suit. As a result of this careful craftsmanship, the Act, in its final form, affects only areas immediately adjacent to RHCFs; prohibits only nonconsensual approaches within six feet; and applies only within a clearly marked eighteen-foot radius from clinic entrances and exits. This framework is more precisely focused and gives abortion protesters more opportunity for advocacy than does the Colorado statute upheld in *Hill*. *Compare* Mass. Gen. Laws ch. 266, § 120E 1/2 *with* Colo. Rev. Stat. § 18-9-122.[4] Because

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[4] To illustrate, the Act creates a six-foot bubble around unwilling listeners, as opposed to the eight-foot bubble sanctioned under the Colorado law; the Act covers an eighteen-foot radius as opposed to the 100-foot ra-

the Supreme Court concluded that the Colorado statute was narrowly tailored, the Act too satisfies that requirement. If, as the *Hill* Court stated, visual and verbal images are able to cross an eight-foot floating buffer zone with sufficient ease that the "restriction on an unwanted physical approach leaves ample room to communicate a message through speech," 530 U.S. at 729, 120 S. Ct. 2480, that same conclusion perforce must apply to the Act's less commodious six-foot floating buffer zone.

D. The Equal Protection Challenge.

Without developing the argument in detail, the plaintiffs, like the court below, conclusorily assert that the Act violates the Equal Protection Clause. Because the equal protection interests involved in the differential treatment of speech are inextricably intertwined with First Amendment concerns, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972), and the plaintiffs do not develop the point separately, we treat this assertion as part of the plaintiffs' First Amendment challenge. In all events, it need not occupy us for long.

From time to time, the Supreme Court has invoked equal protection rather than free speech, as the basis for invalidating a content-based speech restriction. *E.g.*, *Carey v. Brown*, 447 U.S. 455, 459-63, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980); *Mosley*, 408 U.S. at 94-95, 92 S. Ct. 2286. But where the state shows a satisfactory rationale for a content-neutral time, place, and manner regulation, that regulation **[*50]** necessarily passes the rational basis test employed under the Equal Protection Clause. *See Thorburn v. Austin*, 231 F.3d 1114, 1122 (8th Cir. 2000); *Hoover v. Morales*, 164 F.3d 221, 227 n.3 (5th Cir. 1998); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 411 n.7 (6th Cir. 1997). So it is here: the Act passes muster under the Equal Protection Clause for the

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dius covered by the Colorado statute; and the Act, unlike its Colorado counterpart, does not go into effect unless and until the covered area has been clearly delineated.

same reasons that it passes muster under the First Amendment.

IV. THE DUE PROCESS CHALLENGE

The failure of the plaintiffs' First Amendment challenge does not end our journey. Even if the trial court's rationale collapses, an appellee is free to defend the judgment below on any other ground made manifest by the record. *Mass. Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 481, 96 S. Ct. 2158, 48 L. Ed. 2d 784 (1976) (per curiam); *United States v. Craven*, 239 F.3d 91, 97 (1st Cir. 2001). Embracing that tenet, the plaintiffs urge us to affirm the issuance of the preliminary injunction on the ground that the Act vests unbridled discretion in RHCFs (and, thus, violates the plaintiffs' due process rights).

This exhortation hinges upon language in the Act which provides that the six-foot floating buffer zone "shall only take effect during a facility's business hours and if the area contained within the radius ... is clearly marked." Mass. Gen. Laws ch. 266, § 120E 1/2 (c). The plaintiffs posit that this language vests private actors—the RHCFs—with unconstrained power to restrict speech, and they cite numerous cases for the black-letter proposition that the Due Process Clause forbids standardless delegations of governmental authority, especially to private parties. *E.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-31, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758-59, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988); *Freedman v. Maryland*, 380 U.S. 51, 57-59, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965).

The district court rejected this asseveration, concluding that the quoted portion of the Act "is more logically viewed as a notice requirement serving to protect the interests of speakers such as plaintiffs." *McGuire*, 122 F. Supp. 2d at 101 n.7. We agree with this assessment. While the plaintiffs cherry-pick statements from the case law in an effort to bolster their position, they have wrested these statements from their contextual moorings.

Without exception, the cases on which the plaintiffs rely involve licensing schemes that allowed public officials to make discriminatory, content-based decisions. *E.g., City of Lakewood*, 486 U.S. at 759, 108 S. Ct. 2138; *Heffron v. Intl Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648- 49, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981). By their very nature, licensing schemes that embody grants of standardless discretion to public officials (or sometimes private individuals—conceptually, it makes no difference) cannot constitute valid time, place, and manner restrictions because they "ha[ve] the potential for becoming a means of suppressing a particular point of view." *Heffron*, 452 U.S. at 649, 101 S. Ct. 2559. Since the floating buffer zone contemplated by the Act is content-neutral, *see supra* Part III(B), the activation provision cannot raise this type of constitutional concern. And in all events, the activation provision, to the extent that it allows clinic employees to make decisions that have a disproportionate impact on anti-abortion speech, is easily justified **[*51]** as an incidental burden.[5] *See Nat'l Amusements*, 43 F.3d at 740.

V. CONCLUSION

The existence of a four-part framework for granting or denying preliminary injunctive relief does not mean that all four components are weighted equally. In the great majority of cases, likelihood of success constitutes the proper focal point of the inquiry. *Ross-Simons*, 102 F.3d at 16. This case is no exception. The district court premised its issuance of a preliminary injunction on its mistaken view that the plaintiffs probably would succeed on their First Amendment challenge. But this conclusion is insupportable. *See supra* Part III(B-C). Moreover, the plaintiffs cannot establish a probability of merits success on any other theory encompassed

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[5] We note an irony: as a practical matter the activation provision tends to favor (rather than curtail) anti-abortion expression because it establishes conditions that RHCFs must meet before the Act's prophylaxis takes effect.

within their facial challenge to the Act. *See supra* Parts III(D), IV. Since likelihood of success is the sine qua non of preliminary injunctive relief, *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993), we need go no further.

We reverse the order granting a preliminary injunction and remand for further proceedings consistent with this opinion. The stay previously issued is dissolved as moot.

Appendix A
Mass. Gen. Laws ch. 266 § 120E 1/2

SECTION 120E 1/2: Reproductive Health Care Facilities

(a) For the purposes of this section, "reproductive health care facility" means a place, other than within a hospital, where abortions are offered or performed.

(b) No person shall knowingly approach another person or occupied motor vehicle within six feet of such person or vehicle, unless such other person or occupant of the vehicle consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of 18 feet from any entrance door or driveway to a reproductive health care facility or within the area within a rectangle not greater than six feet in width created by extending the outside boundaries of any entrance door or driveway to a reproductive health care facility at a right angle and in straight lines to the point where such lines intersect the sideline of the street in front of such entrance door or driveway. This subsection shall not apply to the following:—

(1) persons entering or leaving such facility;

(2) employees or agents of such facility acting within the scope of their employment;

(3) law enforcement, ambulance, fire-fighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

(4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

(c) The provisions of subsection (b) shall only take effect during a facility's business hours and if the area contained within the radius and rectangle described in said subsection (b) is clearly marked and posted.

[*52] (d) Whoever knowingly violates this section shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 and not more than $5,000 or not more than two and one-half years in a jail or house of correction, or both such fine and imprisonment. A person who knowingly violates this section may be arrested without a warrant by a sheriff, deputy sheriff or police officer if that sheriff, deputy sheriff, or police officer observes that person violating this section.

(e) Any person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 and not more than $5,000 or not more than two and one-half years in a jail or house of correction, or both such

fine and imprisonment. A person who knowingly violates this section may be arrested without a warrant by a sheriff, deputy sheriff or police officer.

(f) A reproductive health care facility or a person whose rights to provide or obtain reproductive health care services have been violated or interfered with by a violation of this section or any person whose rights to express their views, assemble or pray near a reproductive health care facility have been violated or interfered with may commence a civil action for equitable relief. The civil action shall be commenced either in the superior court for the county in which the conduct complained of occurred, or in the superior court for the county in which any person or entity complained of resides or has a principal place of business.

Appendix B

S.B. 148, 181st Gen. Ct., Reg. Sess. (Mass. Jan. 6, 1999)

An Act relative to reproductive health care facilities

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:

SECTION 1. It is hereby found and declared that existing law does not adequately protect the public safety in the areas in and around reproductive health care facilities. Indeed, such facilities in the Commonwealth of Massachusetts have been the focal point of many blockades, disturbances and even violence, particularly the shootings at two reproductive health services facilities on December 30, 1994, which, left two persons dead and many injured.

It is further found that persons attempting to enter or depart from reproductive health care facilities have been subject to harassing or intimidating activity by persons approaching within extremely close proximity and shouting or waving objects at

them, which has tended to hamper or impede access to or departure from those facilities.

It is further found that such activity near reproductive health care facilities creates a "captive audience" situation because persons seeking health care services cannot avoid the area outside of reproductive health care facilities if they are to receive the services provided therein, and their physical and emotional ailments or conditions can make them [*53] especially vulnerable to the adverse physiological and emotional effects of such harassing or intimidating activities directed at them from extremely close proximity.

It is further found that the violence and disturbances described above have required the deployment of police officers at significant cost to the cities and towns of the Commonwealth, and continue to occur despite civil injunctions that prohibit certain persons from engaging in such conduct.

And it is further found that studies have shown that clinics with buffer zones experience far larger decreases in every type of violence than clinics without buffer zones.

Therefore, the purpose of this legislation is:

(1) to increase the public safety in and around reproductive health care facilities;

(2) to maintain the flow of traffic and prevent congestion around reproductive health care facilities;

(3) to enact reasonable time, place and manner restrictions to reconcile and protect both the First Amendment rights of persons to express their views near reproductive health care facilities and the rights of persons seeking access to those facilities to be free from hindrance, harassment, intimidation and harm; and

(4) to create an environment in and around reproductive health care facilities which is conducive towards the provision of safe and effective medical services, including surgical procedures, to its patients.

SECTION 2. Chapter 266 of the General Laws is hereby amended by inserting after section 120E the following section:—

(a) For the purposes of this section, "reproductive health care facility" shall mean a place, other than within a hospital, where abortions are offered or performed.

(b)(1) Except for those listed in subsection (2) below, no person shall, during business hours of a reproductive health care facility, knowingly enter or remain in the following area of private property of a reproductive health care facility or public right-of-way:

(A) the area within twenty-five (25) feet of any portion of an entrance to, exit from, or driveway of a reproductive health care facility; and

(B) the area within the rectangle created by extending the outside boundaries of any entrance to, exit from, or driveway of, a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.

(2) The provision of subsection (1) of this graph shall not apply to the following:

(A) persons entering or leaving such facility;

(B) employees or agents of such facility acting within the scope of their employment;

(C) law enforcement, ambulance, fire-fighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

(D) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the ur qse of reaching a destination other than such facility.

[*54] (c) Whoever knowingly violates this section be punished, for the first offense, by a fine of not more than one thousand dollars or not more than six months in a jail or house of correction or both, and for each subsequent offense by a fine of not less than five hundred dollars and not more than five thousand dollars or not more than two and one-half years in a jail or house of correction or both.

A person who knowingly violates this section may be arrested without a warrant by a sheriff, deputy sheriff, or police officer.

(d) Any reproductive health care facility or any person whose rights to provide or obtain reproductive health care services have been interfered with by a violation of this section may commence a civil action for damages or injunctive and other equitable relief, including the award of compensatory and exemplary damages. Said civil action shall be instituted either in the superior court for the county in which the conduct complained of occurred, or in the superior court for the county in which any person or entity complained of resides or has a principal place of business. An aggrieved person or entity which prevails in an action authorized by this paragraph, in addition to other damages, shall be entitled to an award of the costs of the litigation and reasonable attorney's fees in an amount to be fixed by the court.

(e) A criminal conviction pursuant to the provision of this section shall not be a condition precedent to maintaining a civil action pursuant to the provision of this section.

SECTION 3. The provisions of this act shall be deemed severable, and if any provision of this act is adjudged unconstitutional or invalid, such judgment shall not affect other valid provisions hereof.

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MARY ANNE MCGUIRE, RUTH SCHIAVONE AND JEAN B. ZARELLA,

Plaintiffs,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,[1] *et al.*,

Defendants.

No. Civ.A. 00-12279-EFH

Nov. 20, 2000

[122 F. Supp. 2d 97]

MEMORANDUM AND ORDER

HARRINGTON, District Judge.

At issue in this case is the constitutionality of the recently enacted Massachusetts statute, Mass. Gen. L. ch. 266, Section 120E 1/2, that regulates speech-related conduct within eighteen feet of reproductive health care facilities. The specific section of the statute that is challenged imposes both criminal and civil penalties on persons who knowingly approach another person, within six feet of such person, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling," unless the targeted individual consents to such approach.[1] Exempted from the statute are **[*99]** "persons en-

[1] Mass.Gen.L. ch. 266, Section 120E 1/2 (b). The statute reads in relevant part: "No person shall knowingly approach another person or occupied motor vehicle within six feet of such person or vehicle, unless

tering or leaving such facility" and "employees or agents of such facility acting within the scope of their employment."[2] The question is whether the First Amendment rights of the speaker are abridged by the protection the statute provides for the unwilling listener.

Plaintiffs Mary Anne McGuire, Ruth Schiavone, and Jean B. Zarrella are three private citizens who regularly travel to the sidewalks and public ways in front of and near reproductive health care facilities, attempting to dissuade women from having abortions by engaging in counseling activities, including distributing leaflets and engaging in oral conversations. Plaintiffs allege that their fear of criminal prosecution caused them to be chilled in their exercise of fundamental constitutional rights.

Plaintiffs filed a Complaint praying for a declaration that the Massachusetts statute is facially invalid and seeking an injunction against its enforcement. They allege that Mass. Gen. L. ch. 266, Section 120E 1/2 is facially unconstitutional because it violates their right to freedom of speech under the First and Fourteenth Amendments to the United States Constitution. Specifically, plaintiffs claim three causes of action: (1) a violation of the First Amendment's Freedom of Speech Clause; (2) a violation of the Equal Protection Clause of the Fourteenth Amendment; and (3) a vio-

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such other person or occupant of the vehicle consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of 18 feet from any entrance door or driveway to a reproductive health care facility or within the area within a rectangle not greater than six feet in width created by extending the outside boundaries of any entrance door or driveway to a reproductive health care facility at a right angle and in straight lines to the point where such lines intersect the sideline of the street in front of such entrance door or driveway." *Id.*

[2] *See* Section 120E 1/2 (b) (1-2). Also exempted are various law enforcement and emergency personnel, and persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility. Section 120E 1/2 (b)(3-4).

lation of the Due Process Clause of the Fourteenth Amendment. The several named defendants are those state officers empowered to prosecute violators of the laws of the Commonwealth, and are represented by the Attorney General of the Commonwealth of Massachusetts.

The issue pending before this Court is whether, on its face, the statute is unconstitutional in any of the following four respects. First, whether the Act's explicit singling out of reproductive health care facilities indicates that is a content-based regulation of speech. Second, whether the exemption for certain people, particularly employees and agents of the facilities, represents impermissible governmental protection for one side of the abortion debate, while abridging fundamental free speech rights of the other. Third, whether the process for physically marking the buffer zones amounts to a discriminatory activation provision. Fourth, whether the language of the statute, aimed primarily at oral communications, reveals that its true intent is the suppression of speech rather than any of the four stated purposes.[3]

In order to obtain a preliminary injunction, plaintiffs must show that: (1) they will suffer irreparable harm if the injunction is not granted; (2) such injury outweighs any harm which granting injunctive relief would inflict on the defendants; (3) they have a reasonable likelihood **[*100]** of success on the merits; and (4) the public interest will not be adversely affected by the granting of this injunction. *See*

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[3] Section 1 of S.B. No. 148 reads: The purpose of this act is to:—(a) Increase the public safety in and around reproductive health care facilities; (b) maintain the flow of traffic and prevent congestion around reproductive health care facilities; (c) enact reasonable time, place and manner restrictions to reconcile and protect both the first amendment rights of persons to express their views, assemble and pray near reproductive health care facilities and the rights of persons seeking access to such facilities to be free from hindrance, harassment, intimidation and harm; and (d) create an environment in and around reproductive health care facilities which is conducive to safe and effective medical services, including surgical procedures, for patients."

Foxboro Co. v. Arabian Am. Oil Co., 805 F.2d 34, 36 (1st Cir. 1986); *see also Campbell Soup v. Giles*, 47 F.3d 467, 470 (1st Cir. 1995). Here, in dealing with the First Amendment rights of free speech, it is virtually undisputed that plaintiffs have reached at least two of those factors. The impermissible chilling of First Amendment rights is, perhaps, one of the more compelling examples of irreparable harm. Further, the right of free speech is so precious in our constitutional scheme that such injury outweighs whatever harm is inflicted on defendants. To be sure, the public interest is affected by either the implementation of the statute or an injunction against it. Whether the public interest is more adversely affected by the statute or by an injunction against it is ultimately dependent on the reasonable likelihood of plaintiffs' success on the merits in challenging the statute's constitutionality.

Defendants contend that this matter is covered and is controlled by the United States Supreme Court's recent decision in *Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000). In *Hill*, the Court found constitutional a Colorado statute nearly identical to the Massachusetts statute at issue in this case. The Colorado statute creates a 100-foot buffer zone around all medical facilities in that state, and prohibits all unwanted approaches within eight feet of anyone inside of the buffer zone. In a 6-3 decision, the Supreme Court upheld four state court opinions determining that the Colorado statute was content-neutral. As a result, the Court applied the test it articulated in *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989), finding that the statute imposed "content-neutral time, place and manner restrictions narrowly tailored to serve a significant government interest" and "left open ample alternative channels of communication." *Hill*, 530 U.S. at ----, 120 S. Ct. at 2486 (quoting *Ward*, 491 U.S. at 785, 109 S. Ct. 2746). In doing so, the Court said that "the principal inquiry in determining content-neutrality, in speech cases generally and in time, place or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Hill*,

530 U.S. at ----, 120 S. Ct. at 2491 (quoting *Ward*, 491 U.S. at 791, 109 S. Ct. 2746). The Court found that "the Colorado statute pass[ed] that test for three independent reasons." *Hill*, 530 U.S. at ----, 120 S. Ct. at 2491.

> First, the statute was not a regulation of speech. Rather, the Colorado statute was "a regulation of the places where some speech may occur." Second, it was not adopted "because of disagreement with the message it conveys...." Third, the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech.... [G]overnment regulation of expressive activity is "content neutral" if it is justified without reference to the content of the regulated speech. *Id.*

Defendants urge that the Massachusetts statute is so similar to the Colorado statute that this Court is bound to reach the same result as the United States Supreme Court did in *Hill*.[4] If anything, they claim, [*101] the Massachusetts statute is less burdensome to free speech. The Massachusetts buffer zone is considerably smaller than Colorado's (eighteen feet as opposed to 100 feet) and offers less protec-

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[4] Defendants also point to an advisory opinion from the Justices of the Massachusetts Supreme Judicial Court which opined that Senate 148, as then written, did not violate the First Amendment to the United States Constitution and/or Article 12 of the Massachusetts Declaration of Rights. While the Supreme Judicial Court found that the explicit reference to reproductive health care facilities did not render the statute a content-based regulation, the Massachusetts statute in this case is different from the one reviewed by the Supreme Judicial Court. Months after the Supreme Judicial Court opinion, the United States Supreme Court decided *Hill v. Colorado*, *supra*, prompting the Massachusetts Legislature to redraft Senate 148, borrowing language from the Colorado statute. Further, the Supreme Judicial Court did not address the relevance of exemptions for certain groups of people. As a result, while the Supreme Judicial Court decision informs this Court, it would not be fair to presume that the Supreme Judicial Court has announced its interpretation of this statute in its current form.

tion from unwanted approaches (six feet as opposed to eight feet). Further, defendants argue, the Massachusetts legislature crafted the statute to be only as restrictive as necessary to serve its purposes. Whereas the Colorado statute applies to all medical facilities, the Massachusetts statute is more narrowly-tailored and applies only to reproductive health care facilities. In that way, speech is regulated only where its exercise has given rise to a competing government interest.

Conversely, plaintiffs urge that *Hill* does not apply because the Massachusetts statute is distinguishable from the Colorado statute in several fatal respects. First, because the Massachusetts statute applies only to reproductive health care facilities and not to all medical facilities, the statute is not content neutral. Both the explicit language of the statute and the legislative history make clear that only reproductive health care facilities, *in fact only those where abortions are offered or performed*, fall within the purview of the Act.[5] Unlike in Colorado, where the legislature heard testimony regarding animal rights demonstrations, the Massachusetts legislature heard only testimony about the climate around abortion clinics.[6] Plaintiffs argue, then, that the Massachusetts statute is a content-based regulation of speech and thus, should be subjected to strict scrutiny by this Court.

Plaintiffs also contend that the statutory exemption for several groups of people, particularly employees or agents of the abortion clinics, is a violation under the Equal Protection Clause of the Fourteenth Amendment. Employees and agents of the clinics are not required to gain consent before approaching anyone in the buffer zone, and may do so for any reason within the scope of their employment. Plaintiffs claim that the exemption reflects impermissible governmental preference and support for one side of the debate. In-

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[5] *See* Mass.Gen.L. ch. 266, Section 120E 1/2 (a).

[6] *See* Defendants' Brief, Kealy Aff., *Exhibits A-1.*

deed, the legislative history submitted by defendants records testimony from an agent of one clinic who participates in an organized group of "pro-choice women and men" who voluntarily escort women as they enter and exit the facility. *Exhibit I.*[7]

Ultimately, then, the Massachusetts statute differs from its Colorado counterpart in two critical ways. One, the Massachusetts statute applies only to abortion clinics, and not to all medical facilities and, two, the regulation of speech does not apply equally to everyone involved in the abortion debate.

The initial issue before this Court is to determine whether **[*102]** Mass. Gen. L. ch. 266, Section 120E 1/2 restricts on content-based speech or is a content-neutral regulation. Content-based restrictions are subject to strict scrutiny by the courts because they place the weight of government behind the disparagement or suppression of some messages. *Hill*, 530 U.S. at ----, 120 S. Ct. at 2499. The government is held to a very exacting and rarely satisfied standard when the statute disfavors the discussion of particular subjects, such as abortion, or particular viewpoints within a given subject matter, either the pro-life or pro-choice position. *Hill*, 530 U.S. at ----, 120 S. Ct. at 2500. A statutory

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[7] Plaintiffs make two additional arguments. Plaintiffs claim that the operators of the facilities are vested with speech-regulating powers reserved for the government because of the provision that requires facilities wishing to avail themselves of the statute's protections to mark the regulated zones. That provision is more logically viewed as a notice requirement serving to protect the interests of speakers such as plaintiffs. Further, the Boston Police actually executed the posting and marking, according to the specifications outlined in the statute. Plaintiffs also urge that an examination of the statutory language reveals that the government's true intent is the suppression of speech rather than the ostensible public policy and safety concerns articulated in the legislative history because the statute fails to cover acts of physical violence. This argument, that the statute's focus on oral communications reveals that its intent is the suppression of speech rather than the promotion of public safety, is considered by this Court under the issue as to whether the speech regulated is content-based speech.

restriction of speech is content-based requiring strict scrutiny if the restriction is imposed because of the content of the speech. *Hill*, 530 U.S. at ----, 120 S. Ct. at 2500.

A statute restricts viewpoint based speech if it "makes it likely that prosecution will occur based on displeasure with the position taken by the speaker." *Hill*, 530 U.S. at ----, ----, 120 S. Ct. at 2485, 2486. The principal inquiry in determining whether a statute's restrictions are content-based is whether the government has adopted a regulation of speech because of disagreement with the message the speech conveys. *Hill*, 530 U.S. at ----, 120 S. Ct. at 2491.

The Massachusetts statute applies exclusively to speech communicated at abortion clinics and not, as did the Colorado statute, to *all health care facilities*. The Supreme Court held the speech restricted in *Hill* to be content-neutral because of the comprehensive coverage of the Colorado statute. The Colorado General Assembly "was concerned with the safety of individuals seeking *wide-ranging health care services*, not merely abortion counseling and procedures." [emphasis supplied.] *Hill*, 530 U.S. at ----, 120 S. Ct. at 2488. The *Hill* case held that the comprehensiveness of the statute was a virtue, not a vice, because it was evidence against there being a discriminatory governmental motive. The *Hill* case stressed that the Colorado statute applied as equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries, as it did to abortion protestors. It is clear that the Colorado statute regulates a broad category of communications, and is not limited merely to speeches relating to abortion.

However, the restrictions set forth in the Massachusetts statute pertain exclusively to speech that communicates a message of protest, education or counseling spoken at the entrances of abortion clinics and are directed only at the subject of abortion.[8] It is also only speech, and not acts of physi-

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[8] Logic and experience dictate that in order to determine whether a particular speech constitutes oral protest, education or counseling, rather than social or random conversation, it is necessary to examine the content

cal violence, that is regulated by a statute whose purpose is ostensibly public safety. In brief, the restrictions contained in the Massachusetts statute apply only to speakers involved in the abortion debate. The legislative history also makes this exceeding clear. The Court rules that the statute is a regulation of speech and the content of the only speech regulated is the subject of abortion.

However, even if the regulation were held not to be one of content-based speech because the statute is "justified without reference to the content of the regulated speech" because of the competing government interest of safety and order, *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989), restrictions on speech must be absolutely neutral regardless of the viewpoint being expressed. *Hill* emphasized that the Colorado statute's restrictions did not favor nor discriminate against either abortion viewpoint, as the restrictions applied regardless of the viewpoint being advocated.

[*103] Thus, the ultimate issue for determination by this Court is whether the restrictions contained in the Massachusetts statute apply equally to all speakers at the entrances of abortion clinics, regardless of their viewpoints on abortion, and do not favor one viewpoint over another. *Hill*, 503 U.S. at ----, ----, 120 S. Ct. at 2486, 2491. There can be no discrimination between the viewpoints advocated, between those who advocate that the life of the unborn child should be preserved and those who advocate that the viability of the unborn child can by legal right be terminated.

The Massachusetts statute, by its very terms, exempts from its restrictions the employees and agents of the abortion clinics within the restricted public areas.[9] These indi-

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of the exact words which were actually spoken in the conversation between the speaker and the listener.

[9] Employees and agents of abortion clinics escort potential abortion clinic clients and counsel and exhort them to undergo an abortion within the restricted areas.

viduals, because of their personal relationship with the abortion clinic, have a strong financial interest or philosophic incentive to counsel the listener to undergo an abortion and they constitute very zealous advocates for this controversial procedure. *In contrast, the Colorado statute in Hill allowed no exemptions from its restrictions on speech.*

For the Massachusetts statute to pass constitutional muster, this exemption, at the very least, must be stricken from the statute's provisions. With this exemption as a constituent provision of the statute, the statute's restrictions are directed against speakers who advocate the pro-life position and exempt from its restrictions employees and agents of the abortion clinics who retain the unfettered right to educate and counsel potential abortion clients within the restricted public areas. The restricted areas are where the contending advocates have the most immediate and forceful persuasive impact on the listener; where the opposing viewpoints are most vigorously contested. This constitutes patent discrimination, and this statute, therefore, cannot be considered a content neutral regulation of speech. The Massachusetts statute clearly accords preferential treatment to expression concerning one particular viewpoint on the abortion issue, that of pro-choice.

This preference constitutes unequal protection of the law in the precious area of free expression in a matter of serious public debate where the government must be absolutely neutral. "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Department of the City of Chicago, et al. v. Mosley*, 408 U.S. 92, 96, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972). By the discriminatory terms of the statute, it is clearly manifest that the government disfavors the discussion of a particular viewpoint, the viewpoint that counsels a respect for the life of the unborn child in the robust abortion debate. The government must never take

sides in the battle of ideas and ideals in the traditional public forum.

Because of the exemption of the abortion clinics' employees and agents from the statute's restriction of speech on the subject of abortion within the restricted public areas, this Court holds that it is obvious that, in discriminating against the viewpoint of the pro-life advocates, the government has adopted a regulation of speech because of disagreement with the message that speech conveys, while at the very same public forum permitting interested abortion advocates to be absolutely free to counsel their listeners to have an abortion. For a statute to permit one viewpoint in a serious debate over public policy to speak freely in the public square, while the other side is statutorily required to remain silent strikes at the core of the First Amendment. The government must remain scrupulously neutral in the area of free speech or that great bulwark of human freedom is eroded.

The issue of abortion is one of the most profound moral, religious and legal issues [*104] of our time. Not since the issue of slavery tore asunder the social fabric of the Union and led to the of the Civil War, in which the blood of brothers drenched the soil of this nation in expiration of slavery's grievous crime against nature, has an issue so galvanized the intellectual and spiritual conscience of the nation.

The intense national debate on abortion is based on a profound and serious philosophical and biological dispute between so-called pro-life advocates who are morally convinced that an unborn child is a living human person whose right to life should be secured by the protections of the United States Constitution and so-called pro-choice advocates who are as convinced that the unborn child is not such a living human person and that the unborn child's mother

has the choice to terminate the life of her unborn child, even, in some instances, of a child partially born.[10]

It was less than thirty years ago that abortion was branded an abominable crime by most states, and considered a moral evil by most people.[11] Pro-life advocates who firmly believe that abortion remains a grave moral evil must be given as equal an opportunity as their opponents to express to those seeking an abortion their sincere message of respect for the sanctity of innocent human life.[12] The First Amendment requires no less. *Police Department of the City of Chicago, et al.*, 408 U.S. at 96, 92 S. Ct. 2286. The right to speak as freely as one's opponents in the traditional public forum is the most valuable of our rights in a constitutional democracy, for otherwise public policy would not be shaped by a fully informed and fair citizenry.

This Court declares Mass. Gen. L. ch. 266, Section 120E 1/2 (b) to be unconstitutional as violative of the First Amendment to the United States Constitution and issues a preliminary injunction enjoining its enforcement pending a

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[10] In addition to the unborn child, others who have been accorded non-person status under the law were Blacks in the ante-bellum south suffering under the inhuman, but constitutional yoke of slavery and Jews in Hitler's Nazi Germany who were herded under deportation orders to the gassy fumes of the death camps. It is one of the glories of our nation's history that William Lloyd Garrison and the other Abolitionists were free to vigorously express their conviction that slavery was a grave moral wrong.

[11] *See* Ernest Hemingway's short story, "Hills Like White Elephants," in which the couple only hint at a contemplated abortion in hushed tones because of deep and bitter shame.

[12] Before one is quick to criticize the zeal of the pro-life advocates, he should recall Henry David Thoreau's "Civil Disobedience," one of the most influential political documents in the world and the manual for groups who, believing their government to be acting immorally, wish to awaken the conscience of its people. Thoreau believed that it was the essence of heroism to be willing to suffer the indignity of imprisonment for the higher principle of confronting what is believed to be a moral evil.

hearing on the merits of the case.[13] This section disfavors the discussion of the subject of abortion and the pro-life viewpoint within that subject matter.

SO ORDERED.

[13] This specific section of the statute is ruled severable from the complete statute itself.